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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. ~~464~~ 9

JOHN FRANCIS NOTO,

Petitioner,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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CITATIONS

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Opinion Below

The opinion of the Court of Appeals (R. 438)[1] is reported at 262 F. 2d 501.

Jurisdiction

The judgment of the court below (R. 451) was entered on December 31, 1958. The petition for certiorari was filed January 23, 1959 and was granted on October 12, 1959. The Court has jurisdiction under 28 U.S.C. 1254.

[1] "R" refers to the record as printed in this Court and "Tr." to the record from the court below.

Statutes Involved

The pertinent provisions of the Smith Act (18 U.S.C. 2385) and the Internal Security Act of 1950 (50 U.S.C. 781 ff.) are set forth in Appendix A, *infra*.

Questions Presented

1. Whether the evidence was sufficient to support the conviction.

2. Whether the court below erred in holding that the incitement-to-action test of advocacy enunciated in *Yates* v. *United States*, 354 U.S. 298 is inapplicable to a prosecution under the membership clause of the Smith Act.

3. Whether the conviction was based on incompetent, irrelevant, remote and prejudicial evidence.

4. Whether the immunity conferred by section 4(f) of the Internal Security Act of 1950 (50 U.S.C. 783(f)) bars prosecution of the offense charged.

5. Whether the membership clause of the Smith Act is unconstitutional on its face or as applied in this case.

Statement of the Case

The judgment below affirmed the conviction of petitioner, after a jury trial, on a one count indictment (R. 1) charging violation of the membership clause of the Smith Act. This case and *Scales* v. *United States*, No. 8, this Term, present identical questions as to the constitutionality of the membership clause on its face and the effect of section 4(f) of the Internal Security Act as a bar to

the prosecution of Communists under this provision of the Smith Act.

Petitioner was tried and convicted in 1956, a year after the first conviction in *Scales*[2] and a year before this Court's decision in *Yates* v. *United States*, 354 U. S. 298. His conviction was affirmed in 1958, shortly after the affirmance of Scales' second conviction. *Scales* v. *United States*, 260 F. 2d 21.[3]

The indictment

The indictment was returned November 8, 1954 (R. 1). It charged that continuously since January, 1946, the Communist Party of the United States was a society of persons who advocated the forcible overthrow of the Government of the United States as speedily as circumstances would permit, and that during the same period petitioner was a member of the Party knowing that it engaged in such advocacy "and said defendant intending to bring about such forcible overthrow as speedily as circumstances would permit."

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[2] Reversed by this Court, together with another conviction for violation of the membership clause, pursuant to the Government's confession of error and on the authority of *Jencks* v. *United States*, 353 U.S. 657. *Scales* v. *United States*, 355 U.S. 1; *Lightfoot* v. *United States*, 355 U.S. 2.

[3] Fifteen additional prosecutions under the membership clause are pending in the lower courts. *Hellman* v. *United States* (C.A. 9); *United States* v. *Lightfoot* (N.D. Ill.), awaiting re-trial; *United States* v. *Blumberg* (E.D. Pa.), pending on motion for new trial; *United States* v. *Russo* (D. Mass.). and *United States* v. *Weiss* (N.D. Ill.), awaiting trial. The remaining ten cases involve indictments returned in 1948 but never brought to trial against Foster, Dennis, Winter, Davis, Gates, Green, Winston, Hall, Thompson and Stachel, all of whom were also indicted for conspiring to violate the "advocacy" and "organizing" provisions of the Smith Act. See *United States* v. *Foster* (S.D.N.Y.), 80 F. Supp. 479 and *Dennis* v. *United States*, 341 U.S. 494.

The motion to dismiss the indictment

Petitioner moved to dismiss the indictment on the grounds, among others, that the membership clause of the Smith Act is unconstitutional and that section 4(f) of the Internal Security Act bars the prosecution of members of the Communist Party for the offense charged. The motion was denied. (R. 2-3.)

The evidence

It was not disputed that petitioner had been a member of the Communist Party throughout the indictment period and that, within the same period, he had held leading Party positions in Western New York.

The prosecution called ten witnesses. Six were former members of the Communist Party, three of whom had joined the organization as paid spies of the FBI (R. 282, 305-06, 377). The four remaining witnesses merely identified petitioner as having lived and worked in New Jersey under another name in the years 1953-1955 (R. 377-82, 396-412).

Lautner, the principal prosecution witness and a familiar figure in Smith Act cases,[4] became a full-time employee of the Department of Justice after the Communist Party expelled him in 1950 (R. 175, 196). As in the *Yates* case, *supra*, where he testified, Lautner gave a detailed account of his career in the Communist Party from the time he joined in 1929. He testified about numerous conversations, meetings and conventions and recounted what he had been taught and had himself taught in Party schools (R. 5-187). With the exception noted later, none of Lautner's testimony was connected with petitioner in any way.

[4] He has testified in every Smith Act trial since *Dennis*, *supra*.

Lautner also served as the vehicle for the introduction in evidence of the same mass of Communist literature which was introduced through him in *Yates* (e.g., R. 28, 32-33, 42-43, 62-63). Many of these books and articles were not shown to have been known to, much less ever read by, petitioner.

Lautner testified that it was the "common understanding" of Party "initiates" that the provisions of the Party constitution upholding the Constitution of the United States and providing for the expulsion of members advocating force and violence were "double talk", "protective language", and "aesopian". He further testified that the Party's "ultimate aim" was to destroy monopoly capitalism and establish socialism in this country and that, in his opinion, the Party would resort to "force, challenge and violence" for the accomplishment of this objective. (R. 187-96.)

Lautner's only significant contacts with petitioner occurred in 1949 when the former was assigned to set up a so-called "underground" Party structure in New York. In connection with this work, Lautner had several conversations with petitioner about setting up an underground organization in the Buffalo area and arranged to supply him with a photo-offset press and mimeograph machines. (R. 168-75). There was no evidence as to the activities, if any, engaged in by the underground in Buffalo or elsewhere. Lautner testified that one of the purposes of establishing an underground structure was to enable the Party to work for the restoration of a legal status in the event it should be outlawed and to provide printing and mimeographing equipment for use if commercial facilities became unavailable to it (R. 200-02).

The witness Dietch had been a member of the Young Communist League or the Communist Party, from 1933 to

1948 (R. 207, 232, 235). He and petitioner, who were high school classmates, joined the Young Communist League together and attended its educationals (R. 207-08). In later years, he saw petitioner at Party meetings and conventions (R. 233). The only incident to which he testified involving even remotely relevant advocacy occurred at a Young Communist League educational in 1935. There, the instructor, in Noto's presence, stated that "since no ruling class in history had ever been known to willingly surrender its state power without a violent conflict . . . it would be historically necessary for us to resort to forceful and violent means to overthrow our own ruling class." (R. 255.)

Dietch further testified that in March, 1951, when he was in the printing equipment business, petitioner sought his help in the purchase of two small presses for use in the event that the Party was deprived of access to commercial facilities. By arrangement with petitioner, Dietch met with a man whom he knew only as "Jack" to whom he sold two multilyth presses. (R. 235-38.)

The witness Greenberg had been a member of the Communist Party from 1947 to 1951 and met with petitioner frequently in 1949 (R. 382-83, 393). In that year, petitioner asked Greenberg about the possibility of setting up some printing equipment in the dry-cleaning establishment operated by the latter. However, after petitioner and another man inspected the premises, the project was abandoned. (R. 393-94.) In the spring of 1951, at petitioner's request, Greenberg stored some printing equipment in the cellar of his home. The equipment was picked up by two men in November of the same year after Greenberg requested petitioner to have it removed. (R. 395.) In the summer of 1951, petitioner asked Greenberg to locate some homes in which people could stay if they had

to go into hiding, but apparently nothing came of this request (R. 395).

Three witnesses, Chatley, Regan and Hicks, who had joined the Communist Party at the request of the FBI and were paid by it (R. 282, 305-06, 377) testified to conversations with petitioner and to speeches made by him or by others in his presence between 1943 and 1951. If believed, their testimony establishes that petitioner urged building the Communist Party among automobile, steel and electrical workers in the Buffalo area (R. 349, 356-57); opposed American intervention in Korea and advocated outlawing the A bomb (R. 276, 297-98, 361); stated on one occasion that "the capitalist class was its own grave digger", and was present when another speaker said that the Party "would destroy capitalism" (R. 263, 351); was concerned with the security of the Party in the face of Smith Act prosecutions and proceedings under the Internal Security Act (R. 298-99); and asked one of the witnesses to give refuge to an unidentified person who was evading arrest (R. 299-301).[5]

The picture of petitioner which emerges from the testimony is that of a devoted Communist who believed in the victory of socialism in this country (R. 298, 301). But the evidence is devoid of any statement by petitioner, or by anyone in his presence, advocating violent action, present or future, for the overthrow of the Government.[6]

Regan testified that in September, 1951, petitioner grew a moustache and stated that he "was going under a disguise to conceal himself". When Regan saw him for the last time

[5] The person in question never appeared and nothing further occurred.

[6] This appears from the summary of the evidence in the opinion below (R. 441-44).

a month later, petitioner said that he had been doing a great deal of travelling and "had to be on the move". (R. 368-69.)

The only testimony about petitioner subsequent to the fall of 1951 was given by the four remaining prosecution witnesses. They identified him as a man they had known in 1953-1955 as Louis Paresi who had lived with his wife and daughter in New Jersey where he had been employed by the Goodyear Rubber Company (R. 377-82, 396-412).

Petitioner called two witnesses[7] and introduced a number of books and articles in evidence. Among the latter was the *History of the Communist Party of the United States*, by William Z. Foster, the Party chairman, published in 1952. This book contains the only evidence in the record of the advocacy of the Party within the period of the statute of limitations.[8] It contains a detailed outline of the advocacy by the Party of what the author calls "the American road to socialism" through peaceful, democratic processes within the framework of the Constitution (R. 415-19).

The instructions

The trial court instructed the jury, *inter alia*, that it could not convict unless it found that the advocacy of the Party within the statutory period was reasonably calculated to incite persons to action for forcible overthrow as speedily as circumstances would permit (R. 427).

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[7] A librarian who testified that many of the Communist books introduced by the prosecution were available at the Buffalo public library (Tr. 1090-1105) and an FBI agent who described the circumstances of petitioner's arrest in Buffalo on August 29, 1955 (Tr. 1106-09).

[8] From September 1, 1951 to November 8, 1954 (R. 423). See 18 U.S.C. 3282 as amended September 1, 1954, 68 Stat. 1145.

Since the case was tried before the Government had devised "activity" as an ingredient of the offense,[9] no instruction was requested or given requiring the jury to find petitioner an "active" member as a prerequisite to guilt.

The sentence

Upon conviction, petitioner was sentenced to imprisonment for five years.[10]

The opinion below

Although the issue had not been submitted to the jury, the court below found the evidence sufficient to establish that petitioner was "an active member" of the Communis Party (R. 444).

The court stated (R. 449) that because the defendant was not charged with advocating forcible overthrow, "the incitement to action test enunciated in *Yates* v. *United States*, 354 U.S. 298, and applied by us in *Silverman, infra*,[11] and *United States* v. *Jackson*, 257 F. 2d 830 is inapplicable". Accordingly, it held the evidence sufficient (R. 444) without considering whether the Communist Party, to the knowledge of petitioner or in fact, advocated forcible overthrow in the form of an incitement to action rather than as a matter

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[9] In its supplemental memorandum on reargument in *Scales* v. *United States* and *Lightfoot* v. *United States*, Nos. 3 and 4, Oct. Term, 1957.

[10] 18 U.S.C. 2385, as in force at the time of the indictment, provided a maximum fine of $10,000 and a maximum prison sentence of ten years for each violation. By an amendment of July 24, 1956, these penalties were increased to $20,000 and twenty years. 8 U.S.C. 1481, as amended September 3, 1954, provides that a citizen shall lose his nationality for a violation of the Smith Act. 42 U.S.C. 402(u), added by the Act of August 1, 1956, authorizes the court to impose, as an additional penalty for violation of the Smith Act, forfeiture of the accumulated social security credits of the accused.

[11] *United States* v. *Silverman*, 248 F. 2d 671.

of abstract political doctrine. The court also rejected petitioner's contentions that the membership clause is unconstitutional on its face and as applied and that section 4(f) of the Internal Security Act bars prosecution of the offense charged (R. 445-48).

Summary of the Argument

I

The ruling below that the evidence was sufficient to support the conviction is contrary to *Yates* v. *United States* and other applicable decisions of this Court. The decision in *Yates* required the Government, in the present case, to prove that, within the statutory period, (a) the Communist Party advocated forcible overthrow in language calculated to incite persons to future forcible action, and (b) the petitioner knew that the advocacy of the Party was of this character and quality. In addition, the indictment required proof that petitioner had the specific intent of bringing about violent overthrow as speedily as circumstances would permit. The evidence was palpably insufficient to prove any of these elements of the offense.

A. There was a failure of proof as to the advocacy of the Communist Party.

Yates held that the evidence in that case failed to establish that the Party advocated action for forcible overthrow. In consequence of this decision, twelve of the thirteen then pending Smith Act conspiracy cases were terminated in favor of the defendants, eight by dismissing the indictments on motion of the Government. The action of the Government in dropping these cases would appear to be an acknowledgment that it lacked evidence to supply what *Yates* held was the deficiency in its evidence concerning the advocacy of the Communist Party.

The evidence of Party advocacy introduced by the Government in this case does not differ in any material respect from the evidence that *Yates* found "strikingly deficient". This is demonstrated by a detailed comparison of the evidence in the two cases. Furthermore, the evidence in the present record is substantially the same as that which the Court of Appeals for the Second Circuit, in *United States* v. *Silverman* and *United States* v. *Jackson*, held insufficient to prove that the party advocated forcible overthrow in the sense of an incitement to action.

The court below affirmed the conviction only by holding *Yates, Silverman* and *Jackson* "inapplicable" in a prosecution under the membership clause on the theory that the accused is not charged with personal advocacy of forcible overthrow. This holding is plainly erroneous. The gravamen of the offense is membership in a group which advocates forcible overthrow and there is nothing in the statute or legislative history which can possibly give one connotation to advocacy when engaged in by an individual and quite another to advocacy by a group.

The evidence was insufficient for the further reason that the only evidence of Party advocacy within the statutory period was offered by petitioner and establishes that during that period the Party advocated peaceful means for the establishment of socialism in this country. Hence, a reversal would be required even on the untenable construction given the statute by the court below.

B. There was a failure of proof that petitioner had guilty knowledge or intent.

1. There was no evidence that petitioner knew that the Party advocated overthrow in the sense of a call to future forcible action. Although the evidence traced petitioner's membership and activity over an eighteen year period, there

is not a suggestion that he so much as predicted forcible overthrow, much less advocated action to achieve it. The one instance in the record in which any reference was made to forcible overthrow in petitioner's presence occurred in 1935, was patently no more than a prediction about future events, and falls far short of an incitement to action. The holding below that guilty knowledge was proved is contrary to this Court's decisions in *Nowak* v. *United States* and *Maisenberg* v. *United States*.

2. The specific intent charged in the indictment may not be imputed to a member of the Communist Party from the fact—if established—of his knowledge that the organization engaged in illegal advocacy. Petitioner's alleged intent could be proved only by additional evidence that he had the deliberate and specific purpose of effectuating the forbidden objective. There was no such proof. The holding below that guilty intent was proved is contrary to the decision of this Court in *Schneiderman* v. *United States*.

Since the evidence was palpably insufficient on each of the three elements of the offense and since the Government was under no misapprehension as to its burden of proof, the case is one in which, as stated in *Yates*, acquittal is "unequivocally demanded."

II

The admission of prejudicial evidence that was incompetent, irrelevant and remote requires a reversal.

A. Lautner's opinion testimony should have been excluded.

The personal opinion of the witness that socialism can be achieved in this country only "by force, challenge and violence" had no tendency to prove that this was the view of the Communist Party or of petitioner. Moreover, the issue was not whether the Party believed that resort to violence would ultimately be necessary but whether it *presently advocated* violent overthrow in the future. Evidence of the former is not probative of the latter.

Lautner's inflammatory conclusions about the liquidation of Communist Party leaders in Eastern European countries were not shown to have been shared by the Communist Party or petitioner and do not have the slightest relevance to any issue in this case.

Lautner's opinion that it was the "common understanding" of "initiates of the Party" that certain provisions of the Party constitution were "protective language" was incompetent since there is no basis in the record for imputing this conclusion to petitioner.

B. Testimony by Lautner and Greenberg concerning third party acts and declarations outside of petitioner's knowledge should have been excluded. Inflammatory books and articles which Lautner testified he had studied but which were not shown to have been known to petitioner should likewise have been excluded.

1. The evidence in question was incompetent. Petitioner's membership in the Communist Party does not make

him vicariously liable for acts of the Party, its officers or members which were not authorized or participated in by him. And the rule making the declaration of a conspirator competent against his co-conspirators is limited to cases where the indictment charges a conspiracy. Moreover, since no conspiracy was charged, petitioner was denied the protection of instructions on the prerequisites to the application of the co-conspirator rule.

2. The evidence in question was also irrelevant. The ultimate issue of fact was whether petitioner knew the Communist Party to be an organization that advocated action for violent overthrow. That fact could be proved only by evidence that petitioner himself advocated such action or that an authorized Party spokesman did so to his knowledge. The evidence in question was also too remote to be relevant since all of it antedated the statutory period and much of it antedated the enactment of the Smith Act.

The Government stakes its defense of the constitutionality of the membership clause on the fact that the statute requires proof of knowledge by the accused that the advocacy of the organization was illegal. Since petitioner's conviction was secured on evidence of Party advocacy of which petitioner was ignorant, the Government's premise requires a reversal on the ground that the statute was unconstitutionally applied.

III

Prosecution of the offense charged in the indictment is barred by section 4(f) of the Internal Security Act which provides that, "Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute."

It is obvious from the reference to "any other criminal statute" that Congress believed membership per se to be a crime under some law other than the Internal Security Act. The only other criminal statute on the books which might have been applicable to Communist Party members by virtue of their membership was the membership clause of the Smith Act. Since the membership clause makes knowledge that the organization has an illicit purpose an element of the offense, the term "membership per se" must have been intended to embrace membership with such knowledge.

A construction of the term "per se" to exclude membership or officership with knowledge of the purpose of the organization would also negate the immunity which section 4(f) provides against prosecutions under section 4(a). An analysis of the terms of the latter section and its setting in the Act demonstrates that section 4(f) can be meaningful in relation to violations of section 4(a) only if it provides immunity to a member or officer of a Communist organization who has knowledge that the purpose of the organization is to establish within the United States a totalitarian dictatorship under foreign control.

The reading of section 4(f) for which petitioner contends is confirmed by its legislative history. The purpose of the section was to insure the enforceability of the registration requirement of the Internal Security Act by making the privilege against self-incrimination unavailable to officers and members of Communist organizations as a defense for failure to register. The reference to "any other criminal statute" was added to the section only after repeated warnings in the Senate and House that the immunity conferred by section 4(f) in its original form was inadequate because it did not provide immunity from prosecution under the membership clause of the Smith Act.

The fact that Congress intended to immunize Communists from prosecution under the membership clause appears from the legislative history of the Humphrey amendment to the Communist Control Act. That amendment proposed to create a crime identical with the one charged in the indictment by making it an offense to be a member of the Communist Party with knowledge of its alleged seditious purpose. The amendment was defeated only because of representations by the Attorney General and Congressional leaders that it would make membership per se a crime, repeal an essential feature of section 4(f), and nullify the registration provisions of the Internal Security Act.

The savings clause of the Internal Security Act does not override the reference in section 4(f) to "any other criminal statute" since it is well established that a general savings clause cannot prevail over express provisions in the body of the enactment.

IV

The membership clause of the Smith Act is unconstitutional on its face and as applied. As written, it authorizes the conviction of one who is opposed to violent revolution and who joined the organization for some entirely legitimate purpose. Likewise, a conviction is authorized of an accused who is a passive member or who confines his activities to peaceable advocacy and conduct. The Government proposes to obviate these infirmities (1) by interpolating specific intent as an element of the offense and (2) by limiting the reach of the statute to "active" members.

Both as written and with the proposed embellishments, the membership clause differs in vital respects from the "advocacy" and "organizing" provisions which were sustained in *Dennis* v. *United States*. The latter provisions punish individuals for their own advocacy or for organiz-

ing to engage in advocacy. The membership clause, in contrast, penalizes an individual because of the advocacy of other members of the group to which he belongs. It is not advocacy but association that the clause makes criminal.

Association with a group engaged in advocacy is within the protection of the First Amendment and is also a "liberty" protected by due process. Accordingly, the constitutional issues presented are (a) whether the First Amendment and due process permit the proscription of the kind of association which the statute punishes and, if so, (b) whether the statute was constitutionally applied. Petitioner's discussion of these issues is addressed to the questions stated in the Court's order setting *Scales* for reargument, although not in the sequence which the order enumerates.

A. The statute, as interpreted by the Government contravenes the clear and present danger doctrine.

1. Consideration is first given to the question as to whether the clear and present danger doctrine is applicable either with respect to the accused or with respect to the group described in the statute.

(a) Although the doctrine has generally been applied in cases involving restraints on speech, it is equally applicable to the First Amendment right of assembly or association. The Government's argument that the specific intent it interpolates into the statute makes the doctrine inapplicable repeats a contention it advanced in *Dennis* and which the Court rejected. The fallacy of the argument is also demonstrated by the decision in *Schenck* v. *United States*. The Government's reliance on remarks of Justices Holmes and Brandeis in *Abrams* v. *United States* and *Whitney* v. *California* is misplaced. At most, these mean that an intent to produce an *imminent* danger dispenses with the necessity of proof that the danger is, in fact, immediate.

Since this is not the intent that the indictment charges, the remarks relied on are inapplicable, even if the membership clause imports the specific intent that the Government seeks to interpolate.

(b) Whatever the nature of the considerations embodied in the clear and present danger doctrine may be thought to be, they focus upon the consequences of the particular act which is the object of the restraint in question. Since the membership clause restrains association, the question under the doctrine must be whether the association occurs in such circumstances and is of such a nature as to create a clear and present danger of an attempt at forcible overthrow, the evil that the Smith Act seeks to prevent.

It does not follow from the validation of the "advocacy" and "organizing" provisions of the Act in *Dennis* that all of the other proscriptions of the Act are constitutional merely because the statute links them in some fashion to the forbidden advocacy. The validity of each proscription must be judged independently by determining whether the conduct which it penalizes can, under any circumstances, create a clear and present danger. The correctness of this proposition is demonstrated by an examination of the decisions in *Dennis* and *Yates*.

Hence, it is the membership of an accused in an organization that advocates forcible overthrow and not the advocacy of the organization that must be looked to for the source of the danger in a prosecution under the membership clause. This result is required by *De Jonge* v. *Oregon*, as an analysis of that decision shows.

The Government's argument that the clear and present danger doctrine cannot be applied with respect to the membership of the accused because to do so would require "writing the Act off the books" begs the question. The

Government's contention that the doctrine "is to be applied to the organization" and that it is the aggregate "contribution" of all "active" members "that gives the Party power" is analyzed. It is shown that this contention comes down to the fallacious proposition that it is the existence of danger from the advocacy of the organization and not from membership which is relevant under the membership clause.

Furthermore, the Government's aggregate "contribution" theory is based on the proposition that organizational advocacy of forcible overthrow creates a clear and present danger when the organization has a sufficiently large, but unspecified, number of members who confine themselves to innocent activity. This is absurd and contravenes the decision in *De Jonge*.

2. The statute on its face, with or without the interpolation of specific intent and "activity" contravenes the clear and present danger doctrine. This is too plain for argument if, as shown, the doctrine is applicable with respect to the membership of the accused. For, as the Government concedes, no individual can create the danger of forcible overthrow.

The membership clause is likewise invalid, with or without the proposed embellishments, if it be assumed that the relevant source of "danger" is not individual membership but organizational advocacy of violent overthrow. For "danger" from that source can be prevented by statutory provisions narrowly drawn to prohibit the advocacy. In fact, the Smith Act contains such provisions. Hence, the membership clause is an unnecessary and, therefore, an unwarranted invasion of the member's right of association.

3. The statute, as applied, contravenes the clear and present danger of doctrine. This is so whether the doctrine is applied with respect to the conduct of petitioner, the

advocacy of the Communist Party, or the aggregate "contribution" of all "active" members to the objective of forcible overthrow.

The evidence of petitioner's activities within the period of the statute of limitations shows that he did nothing even remotely "dangerous". The only evidence of Party advocacy during this period was that the Party chairman had advocated the achievement of socialism by peaceful and constitutional means. There was no evidence whatever of activity by other Party members of the size of the membership within the statutory period.

Moreover, the international setting in November, 1954, the date of the indictment, was characterized by the absence of any active battlefield in the world, a marked relaxation of international tensions and the recession of the war danger. Thus, the background factors which *Dennis* stressed as creative of the danger found in that case had ceased to exist at the time of petitioner's indictment.

Accordingly, even under the reformulation of the clear and present danger doctrine which *Dennis* enunciated, the balance which must be struck in this case between the magnitude of the danger and the values inherent in the First Amendment requires an acquittal. However, should the Court think otherwise, there are cogent reasons for re-examining the interpretation given the clear and present danger doctrine by the prevailing opinion in *Dennis*.

B. The statute as interpreted by the Government imputes guilt solely from association.

Conspiracy law does not impute guilt from association since it punishes an accused for his personal participation in an agreement to commit a crime. In contrast, the membership clause proscribes association with a group that

advocates forcible overthrow even though the accused has not agreed to such advocacy or performed any act in furtherance of it. This is clear under the membership clause as written. The additional ingredients which the Government proposes to supply do not cure the defect.

The specific intent which the Government reads into the statute cannot substitute for participation in the illegal agreement required in conspiracy cases. For that intent is not an intent to further the forbidden *advocacy* of the organization or even to bring about the substantive evil through or with the aid of the organization of which the accused is a member. It is merely a generalized intent to bring about forcible overthrow by some unstated means. Moreover, this intent plus membership with knowledge of the group's illegal advocacy could not, in any event, give rise to a conclusive presumption that the accused thus became a party to an agreement to engage in such advocacy. The question would still be one for the jury, just as participation by an accused in the conspiratorial agreement is a jury question in every conspiracy case. Since the membership clause as construed by the Government substitutes a conclusive presumption for jury determination of this question, the statute violates due process.

The Government's "activity" factor is of no help in bringing the statute within the ambit of conspiracy law. For a member is "active" who confines himself to innocent and constitutionally protected activity not in furtherance of the group's illegal advocacy or illegal objective. The Government's assertion that "active support of any kind aids the organization in achieving its own illegal purpose" is unwarranted in fact and contrary to the decision in *De Jonge*. At most, the purpose and effect of a member's activity presents a jury question as in the case of alleged overt acts in conspiracy prosecutions. Since the "activity"

factor removes this question from the consideration of the jury, it deprives an accused of jury trial of a fact essential to guilt.

In fact, the Government's defense of the membership clause as a conspiracy statute rests on an inference it draws from the supposed conspiratorial character of membership in a particular organization—the Communist Party. But the statute authorizes a conviction without proof that the membership of the accused was of this character. Thus, on the Government's own showing, the statute violates due process by authorizing a conviction for a crime neither charged nor proved.

The Government's argument that a Communist Party member is *ipso facto* a conspirator relies largely on Justice Jackson's partial concurrence in *A. C. A.* v. *Douds*. But the Government ignores the passages in that opinion which plainly foreshadow the invalidity of the membership clause.

The Government, in this case, has the dual objective of validating the membership clause by analogizing it to a conspiracy statute and, in so doing, of avoiding the burden of proof which embarrasses it in Smith Act conspiracy cases. The Constitution makes these objectives irreconcilable.

C. The statute, as written, is unconstitutional for additional reasons.

1. Lacking the element of criminal intent, the statute penalizes membership for an innocent and lawful purpose. Decisions of the Court flatly hold that such a statute is unconstitutional. *Whitney* v. *California* and *Bryant* v. *Zimmerman*, relied on by the Government, are inapplicable.

2. The Government makes no serious attempt to defend the application of the statute to a passive member or one whose activity is confined to attendance at meetings. Nor

does it press the proposition that the statute can be saved by confining its application to members whose activity is peaceable. Implicit in its argument is the contention that the membership clause is constitutional if restricted to members whose conduct would authorize convictions for conspiracy to violate the "advocacy" provision of the Smith Act. But the Government cannot write this restriction into its definition of an "active" member without making the membership clause a carbon copy of the offense of conspiring to advocate forcible overthrow, a result which Congress obviously could not have intended.

D. The interpretations of the statute proposed by the Government are impermissible.

1. The argument for interpolating specific intent into the membership clause is based on a misapplication of the *Dennis* decision. *Dennis* did not read specific intent into the "advocacy" and "organizing" provisions of the Smith Act on the ground that it was required by constitutional considerations but because one who advocates or organizes for forcible overthrow must be presumed to intend the probable consequences of his acts. This nexus between act and intent is lacking in the case of the offense defined by the membership clause. A person who becomes a member of an organization knowing it to advocate forcible overthrow need not necessarily intend to accomplish that objective. He may have joined for the purpose of effectuating legitimate policies of the organization or to reform it.

Furthermore, an examination of the various provisions of the Smith Act demonstrates that the omission of specific intent from the membership clause was deliberate. Analysis of *Screws* v. *United States* and *A. C. A.* v. *Douds*, relied on by the Government, shows that they are authority for rejecting its position.

2. If the Government's "'activity" factor is an element of the offense, the indictment must be dismissed for failure to charge it. Moreover, a reversal would be required since the issue of petitioner's "activity" was not submitted to the jury.

There is no basis for writing the particular standard of "activity" which the Government has chosen into the membership clause. For there is no indication that Congress intended to incorporate this standard into the statute rather than some other standard or none at all. Under these circumstances, to interpolate the Government's definition of "activity" is not to interpret but to legislate.

Adoption of the Government's proposal that the "activity" factor should be applied by the courts as a constitutional limitation on the application of the statute would mean that legislation could never be invalidated for inherent unconstitutionality. Moreover, the proposal would deprive an accused of a jury trial on those ingredients of the offense which are supplied by judicial construction. The argument that this is permissible in the case of the "activity" factor rests on a supposed analogy to the clear and present danger doctrine. This argument is shown to be fallacious.

In any event, since the evidence shows that petitioner was not an "active" member within the statutory period, application of the Government's proposed constitutional limitation would require his acquittal.

ARGUMENT

I

The Ruling Below That the Evidence Was Sufficient to Support the Conviction Is Contrary to Yates v. United States and Other Applicable Decisions of This Court.

Yates v. *United States, supra,* held (at 319-20) that the Smith Act "was aimed at the advocacy and teaching of concrete action for the forcible overthrow of the Government, and not of principles divorced from action".

Petitioner was charged with membership in the Communist Party, knowing that it engaged in advocacy proscribed by the Smith Act. Obviously, he could not know that the organization was so engaged if, in fact, it was not. The Government was therefore required to prove that, within the period of the statute of limitations, (a) the Communist Party advocated forcible overthrow in language calculated to incite persons to future forcible action, and (b) the petitioner knew that the advocacy of the Party was of this character and quality.[12] In addition, the indictment alleged (R. 1) and proof was therefore required that petitioner had the specific intent of bringing about violent overthrow as speedily as circumstances would permit.

The evidence was palpably insufficient to prove any of these elements of the offense, let alone all of them.

A. The advocacy of the Communist Party

Yates held that the evidence in that case failed to establish that the Communist Party advocated action for forcible overthrow. The Court said (at 329-30):

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[12] We show, *infra*, pp. 39-40, that the Government was required to prove (a) by evidence of facts within petitioner's knowledge.

"... both the record and the Government's brief in this Court make it clear that the Government's thesis was that the Communist Party, or at least the Communist Party of California, constituted the conspiratorial group, and that membership in the conspiracy could therefore be proved by showing that the individual petitioners were actively identified with the Party's affairs and thus inferentially parties to its tenets. This might have been well enough towards making out the Government's case if advocacy of the abstract doctrine of forcible overthrow satisfied the Smith Act, for we would at least have little difficulty in saying on this record that such was one tenet of the Communist Party; and there was no dispute as to petitioner's active identification with Party affairs. But when it comes to Party advocacy or teaching in the sense of a call to forcible action at some future time we cannot but regard this record as strikingly deficient. At best this voluminous record shows but a half dozen or so scattered incidents which, even under the loosest standards, could be deemed to show such advocacy. Most of these were not connected with any of the petitioners, or occurred many years before the period covered by the indictment."

Subsequent to the *Yates* decision, twelve of the thirteen then pending Smith Act conspiracy cases were terminated in favor of the defendants,[13] four by directions for judgments of acquittal and eight by dismissing the indictments on motion of the Government.[14] The action of the Govern-

[13] There have been no further indictments since the decision in *Yates*.

[14] The *Yates* indictment was dismissed as to the nine defendants whom the Court ordered retried. *United States* v. *Silverman*, 248 F. 2d 671, *United States* v. *Jackson*, 257 F. 2d 830, *Huff* v. *United States* and *Fujimoto* v. *United States*, 251 F. 2d 342, directed judg-

ment in procuring the dismissal of the latter indictments would appear to be an acknowledgment that it lacked evidence to supply what Yates held was the deficiency in its proof concerning the advocacy of the Communist Party.[15] For if evidence had been available to establish the Communist Party as the "conspiratorial group" it is hardly conceivable that the Government would have abandoned the effort to convict at least some of the party leaders named in these indictments as participants in the conspiracy.[16] Hence, the Government's action in dropping conspiracy prosecutions against these Party leaders belies its assertion that the evidence in this case is sufficient to establish that the Communist Party was a "conspiratorial group"—i.e., a group that advocates forcible overthrow "in the sense of a call to forcible action at some future time."[17]

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ments of acquittal for all of the defendants. *United States* v. *Kuzma*, 249 F. 2d 619, directed judgments of acquittal for certain of the defendants and the indictment was later dismissed as to the others. The indictments in *Mesarosh* v. *United States*, 352 U.S. 1, *Wellman* v. *United States*, 253 F. 2d 601, *Sentner* v. *United States*, 253 F. 2d 310, and *Brandt* v. *United States*, 256 F. 2d 79, were dismissed after the cases had been remanded for new trials. The indictments in *United States* v. *Russo* (D. Mass.) and *United States* v. *Carrion* (D. P.R.) were dismissed before trial. The thirteenth case, *Bary* v. *United States* (C.A. 10) is pending on appeal from convictions obtained after a re-trial.

[15] In announcing the motion to dismiss the indictment in the *Brandt* case, *supra*, the United States Attorney said, "We can't meet the requirements set down by the Supreme Court in the Yates case." *New York World-Telegram and Sun*, Aug. 19, 1959. Similar explanations were made of the motions to dismiss the other indictments.

[16] The eight indictments which the Government moved to dismiss involved forty-seven state leaders of the Communist Party, a number of whom had also been members of the Party's national committee.

[17] The memorandum for the United States in response to petitioner's petition for certiorari, concedes (pp. 5-6) that the *Yates* test of advocacy is applicable to the advocacy of the organization in a prosecution under the membership clause.

Furthermore, as the Government cannot but acknowledge, the evidence of the advocacy of the Communist Party which it introduced in this case does not differ in any material respect from the evidence that *Yates* found "strikingly deficient". This appears from a comparison of the evidence on the subject in the present record with that introduced in *Yates* and outlined by the Government in detail in Appendix A of its brief in that case in this Court (pp. 138-47).

In both cases, the evidence concerning the advocacy of the Communist Party consisted of the following:

1. The facts and circumstances surrounding the 1945 dissolution of the Communist Political Association, the reconstitution of the Communist Party, and its rededication to the principles of Marxism-Leninism (R. 88-105; *Yates* App. A, pp. 144-47).

2. The so-called "classical" writings of Marx, Engels, Lenin and Stalin, including the *Communist Manifesto*, Lenin's *State and Revolution* and Stalin's *Foundations of Leninism and Problems of Leninism* (R. 28, 62-63; *Yates* App. A., pp. 149-60); the *History of the Communist Party of the Soviet Union* (R. 66; *Yates* App. A, p. 175); the 1921 *Conditions of Affiliation to the Communist International* and the 1928 *Program* of that organization (R. 32-33, 42-43; *Yates* App. A, pp. 159, 170, ftn. 50); and writings of American Communists such as *Marxism and American Exceptionalism* by Foster and *The Communist Party, a Manual on Organization* by Peters (R. 50-51, 110; *Yates* App. A, pp. 162, 175, ftn. 56).

3. The testimony of Lautner that he had studied some of the foregoing books and articles in Communist Party schools in 1930 and 1941, and evidence that some of them

were referred to in study outlines issued by the Party and were used in Party schools subsequent to 1945 (R. 27-43, 63-64, 68-83, 125-29, 218-19, 266; *Yates* App. A, pp. 149-164).

4. Evidence concerning the structure of the Communist Party and the principle of "democratic centralism" requiring strict adherence to Party decisions (R. 156-63, *Yates* App. A, pp. 164-70).

5. Evidence, primarily in the testimony of Lautner, concerning the security measures adopted by the Party after the indictment of the *Dennis* defendants in 1948, the setting up of an "underground" Party structure, providing it with mimeograph machines and printing presses, and arranging hide-outs for Party leaders (R. 164-73; *Yates* App. A, pp. 170-74).

6. Evidence of the Party's industrial "concentration policy", i.e., its emphasis on recruiting members among and attempting to influence workers in the basic industries (R. 206, 692, 872, 908-10; *Yates* App. A, pp. 174-77).

We are confident that the Government will be unable to point to a single item of significant evidence in this case touching on the advocacy of the Communist Party which is not identical with or paralleled by evidence in the *Yates* record.[18] Moreover, the evidence in the present record differs in no material detail from that which the Court of Appeals for the Second Circuit has twice held insufficient to prove that the Communist Party advocated forcible overthrow in the sense of an incitement to action. *United States*

[18] On the contrary, the evidence in *Yates* along the six lines of proof described above is considerably more detailed and voluminous than in the present case.

v. *Silverman*, 248 F. 2d 271, cert. den., 355 U.S. 942; *United States* v. *Jackson*, 257 F. 2d 830.[19]

The court below affirmed the conviction in the face of the decisions in *Yates*, *Silverman* and *Jackson* only by holding them "inapplicable" to a prosecution under the membership clause, on the theory that the accused is not charged with personal advocacy of forcible overthrow (R. 449-50). This holding is plainly erroneous. The gravamen of the offense is membership in a group which advocates forcible overthrow. There is nothing in the statute or the legislative history which can possibly give one connotation to advocacy when engaged in by an individual and quite another to advocacy by a group. On the contrary, *Dennis* v. *United States*, *supra*, at 502, 512, held the incitement to action test applicable to the offense of organizing a group which advocates violent overthrow. And see *Nowak* v. *United States*, 356 U.S. 660, 665, 667.

By erroneously construing the statute, the court below dispensed with the necessity of determining whether the evidence of advocacy by the Communist Party satisfied the incitement to action test. This appears from its summary of the evidence (R. 440-41) which likewise demonstrates that the test was not satisfied.

The evidence concerning the advocacy of the Communist Party was insufficient for a further reason. As the opinion below tacitly acknowledges (R. 441-42), the Government offered no evidence that the Party advocated forcible overthrow, even as a matter of abstract doctrine, within the period of the statute of limitations from September 1, 1951 to the return of the indictment. The only evidence of Party

[19] The evidence concerning the advocacy of the Party is described in detail in the *Silverman* opinion (at 682-86) and the *Jackson* opinion notes (at 832, ftn. 5) that there was no substantial difference in the evidence in the two cases.

advocacy during the statutory period was offered by petitioner. It consisted of excerpts from the *History of the Communist Party of the United States*, written by William Z. Foster, the Party chairman, and published in 1952 (R. 415-19). As we have seen (*supra*, p. 8) the book contains a detailed statement of the means which the Party advocated for the establishment of a socialist government in this country, all of which are peaceful.

The court below ignored the Foster book. It held (R. 441-42) that the evidence of the teachings and activity of the Party prior to the statutory period "and the absence of any evidence of accomplishment or abandonment of their purpose was sufficient to support an inference that the character of the Party as a group dedicated to the violent overthrow of the Government, established in prior years, continued unaltered through the statutory period". However, this inference, if otherwise permissible, was rebutted by the uncontradicted evidence that the advocacy of the Party within the statutory period was peaceable. Hence, a reversal of the conviction would be required even on the untenable construction given the statute by the court below.

B. The knowledge and intent of the petitioner

For the purpose of this branch of the argument, we will assume that the Government proved that, within the statutory period, the Communist Party incited action for forcible overthrow. Even on that assumption, the conviction cannot stand. For there was a complete failure of proof that petitioner had guilty knowledge or intent.

1. Knowledge

The Government's evidence traced petitioner's membership and activities in the Young Communist League and the Communist Party from his high school days in 1933 to 1951.

Yet there is not a suggestion in the record that he ever so much as predicted forcible overthrow, let alone urged action to achieve it. Moreover, the record contains only one instance in the eighteen year period it spans in which any reference was made to forcible overthrow in petitioner's presence. This was said to have occurred in 1935 when an instructor in a Young Communist League class stated that resort to forcible overthrow "would be historically necessary" (R. 255). Assuming the accuracy of the witness' recollection after a lapse of more than twenty years and the relevance of anything so remote, the statement is patently no more than a prediction or expression of opinion about future events and falls far short of an incitement to action. The Court has held statements much closer to the boundary between advocacy of belief and advocacy of action, when made by the accused himself, insufficient to prove knowledge that the Communist Party incites to violent overthrow. *Nowak* v. *United States*, 356 U.S. 660; *Maisenberg* v. *United States*, 366 U.S. 670.[20]

These cases further hold (*Nowak* at 666) that the fact that an accused is an active member and functionary of the Party does not of itself suffice to prove his knowledge of the Party's illegal advocacy. Yet, there is nothing else in this record that bears on the issue of petitioner's knowledge. His activities in the Party "underground" are wholly irrelevant. For there is no evidence that the "underground" engaged or planned to engage in illegal advocacy, much less that petitioner knew of such purpose. All that the evidence shows is that elaborate measures of concealment were taken to safeguard the Party and its members from what was regarded as persecution for their political unorthodoxy

[20] *Nowak* (at 665) so held "even assuming that the evidence of the illegal advocacy of the Party was sufficient," citing the *Yates* case, *supra*.

(R. 200-02, 298-99). However ill advised these measures may have been, they furnish no evidence of criminality. *United States* v. *Silverman, supra,* at 685, ftn. 5. Cf. *Ingram* v. *United States,* 360 U.S. 672, 679-80. Moreover, as the series of Smith Act conspiracy prosecutions and their disposition shows (*supra,* pp. 26-27), the fears which inspired resort to the "underground" proved not wholly without foundation.

Because the court below read incitement out of the membership clause, it dealt with the issue of petitioner's knowledge (R. 442-44) as though knowledge that the Party taught the abstract doctrine of forcible overthrow was sufficient to convict. We do not believe that there was proof even of this sort of knowledge. In any event, the evidence was patently insufficient to prove knowledge of the kind that the statute requires as a requisite to guilt.

2. Intent

The indictment (R. 1) charges petitioner with the specific intent of bringing about forcible overthrow as speedily as circumstances would permit. This intent may not be imputed to a member of the Communist Party from the fact—if established—that he knew the organization to be engaged in illegal advocacy. As *Schneiderman* v. *United States,* 320 U.S. 118, 136, holds:

> "... under our traditions beliefs are personal and not a matter of mere association, and that men in adhering to a political party or other organization notoriously do not subscribe unqualifiedly to all of its platforms and asserted principles."

To the same effect, see *Knauer* v. *United States,* 328 U.S. 654, 669; *Baumgartner* v. *United States,* 322 U.S. 665. Accordingly, petitioner's alleged intent could be proved only

by additional evidence that he had the deliberate and specific purpose of effectuating the forbidden objective. *Hartzell* v. *United States*, 322 U.S. 680.

There was no such evidence. As we have already shown, petitioner's acts and declarations over a twenty year period are devoid of the advocacy of violent revolution, even as a matter of abstract doctrine, and his stated belief in the ultimate establishment of socialism in the United States was unaccompanied by any suggestion of a resort to violence for the accomplishment of that end. Cf. *Hartzell* v. *United States, supra*, at 687, reversing a conviction for lack of proof of the requisite specific intent on evidence far more cogent than anything in the present record.

The court below nevertheless held (R. 442-44) that guilty intent had been proved. It relied on the same evidence which it found established guilty knowledge: petitioner's many years of membership and officership in the Communist Party, his acceptance of Party assignments, and his familiarity with the "classical" literature. The Court, however, has held similar evidence insufficient to prove that a Communist Party member believed in forcible overthrow or lacked attachment to the principles of the Constitution. *Schneiderman* v. *United States, supra.*

We have shown that the evidence in this record was palpably insufficient on each of the three elements of the offense charged in the indictment. The Government was under no misapprehension as to its burden of proof under the statute and the indictment.[21] Accordingly, petitioner's acquittal "is unequivocally demanded." *Yates* v. *United States, supra*, at 328.

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[21] It did not share the misapprehension of the court below that the incitement to action test was inapplicable, but consented to the trial court's instruction on incitement (R. 427), and urged in its brief below (p. 2) that the standard enunciated in *Yates* was satisfied by the evidence.

II

The Admission of Prejudicial Evidence That Was Incompetent, Irrelevant and Remote Requires a Reversal.

In its attempt to prove that the Communist Party engaged in illegal advocacy, the Government introduced prejudicial opinions of its "expert", Lautner, which petitioner was not shown to have shared. It also introduced a mass of inflammatory evidence, much of it remote, about persons whom petitioner had never met, conversations and events of which he had no knowledge, and documents which he had never read. Hence, even if guilty knowledge and intent had been proved, the erroneous admission of this evidence would require a reversal.

A. Lautner's opinion testimony

Lautner testified that the dictatorship of the proletariat cannot be achieved in the United States by peaceful means but only "by force, challenge and violence". He did not ascribe this view to the Communist Party, much less to petitioner, but stated it only as a matter of his own opinion. (R. 194-95) The testimony was obviously incompetent. It was also irrelevant for two reasons. First the personal opinion of the Government's professional witness that force would be required to accomplish the Party's ultimate objective has no tendency to prove that this was the view of the Party or of petitioner. Second, the testimony would be irrelevant even if it were shown that the Party, to petitioner's knowledge, had subscribed to Lautner's opinion. For the issue under the statute and the indictment was not whether the Party believed that resort to violence would ultimately be necessary but whether it *presently advocated* action for violent overthrow in the future. Evidence of the former is not probative of the latter. *Yates*

v. *United States, supra,* at 330; *United States* v. *Silverman, supra;* at 685-86.

Lautner was also permitted to testify, as a matter of "expert opinion", that the Yugoslav Communist Party was expelled from the Communist Information Bureau, its leaders branded as "fascists, mad dogs", and the leaders of the Communist Parties of other Eastern European countries shot or hanged, all for refusing "to bend under Stalin's leadership" (R. 186-87). None of these inflammatory conclusions was shown to have been known to or shared by petitioner or the Communist Party. And, of course, none of them has the slightest relevance to any issue in this case.

Lautner further testified that it was the "common understanding" of "initiates of the Party" that the provisions of the Party constitution upholding American democratic principles and providing for the expulsion from membership of advocates of violence were "protective language" and "double talk" (R. 187-93). Neither Lautner nor any other witness ascribed knowledge of this interpretation of the constitution to petitioner and it does not appear that he ever discussed the subject. Moreover, Lautner did not state what he considered the qualifications of an "initiate" to be or that he included petitioner in that category.[22] As we will show (*infra,* pp. 39-40), third party declarations not known to petitioner concerning the advocacy of the Communist Party are incompetent against him as well as irrelevant. *A fortiori,* Lautner's testimony as to the common understanding of "initiates" is inadmissible since, at most, it is a conclusion from the undisclosed declarations of unidentified third parties.

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[22] Lautner acknowledged that he could not testify as to the "common understanding" of Party members, and the question was then reframed to embrace only "initiates" (R. 187-93).

B. THIRD PARTY DECLARATIONS

The great bulk of the evidence introduced through Lautner was not connected with petitioner in any way.[23] Thus, he testified at length about his activities as a Party functionary in this country and Canada from 1930 to 1950, Party schools in which he studied or taught, conventions and meetings which he attended and conversations that he had with Party officials (R. 7-128). He also identified numerous books and articles which were introduced in evidence on the basis of his testimony that they had been used by him in Party schools or "reflect the activities in the Party" (R. 106, and see, e.g. R. 32, 41-43, 50-51).

Lautner testified, for example, that in 1935, he attended a meeting of Party organizers where Eisler, Peters and Steinberg instructed those present to infiltrate and build Party organizations within units of the National Guard (R. 17-18). Lautner stated that pursuant to these instructions, he undertook to secure Party recruits among Guard members at a New York City armory (R. 11-13). There was no evidence that petitioner knew of the 1935 meeting, was aware of the existence of Eisler, Peters or Steinberg,[24] or had knowledge of any Party policy with respect to the National Guard.

Again, Lautner testified that one Szanto, identified only as a teacher at a 1930 Party school and the editor of a Hungarian newspaper, taught that peaceful transition to socialism in this country had become impossible (R. 52-53, 55).

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[23] His direct examination occupies 388 pages (Tr. 4-386) and accounts for one-third of the typewritten transcript of the evidence. Of this, only 23 pages (Tr. 290-302, 332-43) contain testimony connected with petitioner.

[24] Lautner identified Eisler as a representative of the Communist International, assigned to give leadership to the Party in this country, and Peters as the author of Peter's *Manual* (R. 14-15).

Further, Lautner testified that the *Conditions for Affiliation with the Communist International*, the *Program of the Communist International* and Peter's, *The Communist Party, a Manual on Organization* had been studied by him in Party schools in the 1930's (R. 32-33, 42-43, 50-51). On this foundation,[25] the documents were admitted in evidence and read from at length (R. 33-40, 43-44, 52-61) although it nowhere appears that petitioner was even aware of their existence. Obviously, they were introduced because their contents are more inflammatory than anything contained in current Communist literature or in the "classical" works with which petitioner was shown to be familiar.[26]

The prosecution witness Greenberg was likewise permitted to testify to prejudicial third party declarations outside of petitioner's knowledge. The testimony was that in 1949, two Pittsburgh Party leaders instructed the witness to prevail upon the Young Progressives of America in that city to take up the defense of Party members who had been indicted for inciting to riot as a result of a demonstration against the exclusion of Negroes from a public swimming pool (R. 390-92).[27]

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[25] Lautner testified that the *Program of the Communist International* had been used in Party classes up to 1948 (R. 41). Peter's *Manual* was not used or referred to after 1936 (R. 51-52), and there is no evidence concerning the *Conditions of Affiliation* other than Lautner's testimony that it was used at a school in 1930.

[26] E.g., The *Program of the Communist International* speaks of "a combination of strikes and armed demonstrations and finally the general strike conjointly with armed insurrection against the state power of the bourgeoisie" (R. 38); the *Conditions of Affiliation* states that, "Persistent and systematic propaganda and agitation must be carried on among the Armed Forces, and Communist nuclei must be formed in every military unit" (R. 43); and Peter's *Manual* states that the *Program of the Communist International* and other decisions and resolutions of that organization "cannot be questioned in the Party" (R. 56).

[27] In addition to the fact that petitioner had no knowledge of this incident, the testimony has no conceivable relevance to the advocacy of forcible overthrow.

As the foregoing examples illustrate, each of the third party declarations admitted in evidence was prejudicial standing alone. Their cumulative impact and that of Lautner's opinion testimony was irretrievably to harm petitioner's chances of acquittal.

The declarations in question should have been excluded as incompetent and irrelevant.

1. It is elementary that the declarations of third persons outside the presence and knowledge of the accused are inadmissible against him unless, as in the case of co-conspirators, the relationship of the accused to the declarant imposes vicarious liability upon the former for acts of the latter. This is simply the procedural corollary of the fundamental principle that guilt is personal and, hence, that an accused may not be held criminally liable for the act of another which he has neither authorized nor ratified.

Petitioner's membership in the Communist Party did not make him vicariously liable for acts of the Party, its officers or members which were not authorized or participated in by him. *United States* v. *White*, 322 U.S. 694. And the rule which makes the declaration of a conspirator competent against his co-conspirators is limited to cases where the indictment charges a conspiracy. *United States* v. *Dennis*, 183 F. 2d 201, 230; *McWhorter* v. *United States*, 281 F. 119, 121; *Sorenson* v. *United States*, 168 F. 785, 792; *Barrett* v. *United States*, 33 F. 2d 115. Moreover, since no conspiracy was charged, petitioner was denied the protection of instructions on the prerequisites to the application of the co-conspirator rule.[28]

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[28] I.e., that before a jury can consider the declaration of a third party made in the absence of the accused as evidence against him, it must find that the declarant and the accused were members of the conspiracy and that the declaration was made pursuant to the conspiracy and in furtherance of its objectives. *Krulewitch* v. *United States*, 336 U.S. 440.

The prosecution and the trial court seem to have proceeded on the premise that because the first paragraph of the indictment (R. 1) alleges as a fact that the Communist Party advocates forcible overthrow, the allegation could be proved by evidence unconnected with petitioner, and that the hearsay rule was applicable only to evidence offered under the second paragraph of the indictment charging that petitioner had knowledge of such advocacy. It is too plain for argument, however, that the rule excluding third party acts and declarations, in the absence of authorization or ratification by the accused, cannot be circumvented by manipulating the form of the indictment.

Mr. Justice Jackson, concurring in *Krulewitch* v. *United States, supra,* at 449, wrote:

> "However, even when appropriately invoked, the looseness and pliability of the [conspiracy] doctrine present inherent dangers which should be in the background of judicial thought wherever it is sought to extend the doctrine to meet the exigencies of a particular case."

Of course, conspiracy doctrine is not "appropriately invoked" in a case where no conspiracy is charged. Nor can the doctrine be extended "to meet the exigencies of the case" without abrogating the precept that guilt is personal.

2. The evidence in question was irrelevant as well as incompetent. The ultimate issue of fact for the jury was whether petitioner knew the Communist Party to be an organization that advocated violent overthrow. Accordingly, proof that the Communist Party engaged in illegal advocacy was relevant only if petitioner knew this to be the fact. Guilty knowledge may not be inferred from petitioner's active membership in the Party and his position as a functionary. It can be proved only by evidence that

petitioner himself advocated action for forcible overthrow or that an authorized Party spokesman did so to his knowledge. *Nowak* v. *United States, supra; Yates* v. *United States, supra,* at 330-31. Evidence of Party advocacy outside of petitioner's knowledge was therefore irrelevant.

The evidence in question was also too remote to have relevance. The Government was required to prove that petitioner knew that the Party engaged in illegal advocacy within the statutory period from September 1, 1951 to the date of the indictment. But none of Lautner's testimony reached beyond the termination of his membership in January 1950 (R. 5), and much of it dealt with events antedating the enactment of the Smith Act in 1940. The Government introduced no evidence of Party advocacy of any kind within the statutory period. Evidence introduced by petitioner established that, during this period, the Party advocated peaceful means for the establishment of socialism (*supra,* p. 8). Accordingly, even if current evidence of Party advocacy outside of petitioner's knowledge could somehow be said to be relevant, the evidence introduced through Lautner should have been excluded as remote.

The Government stakes its defense of the constitutionality of the membership clause as written on the fact that, at least, the statute requires proof of knowledge by the accused that the advocacy of the organization was illegal. But petitioner's conviction was secured on evidence of Party advocacy of which petitioner was ignorant. The Government cannot have it both ways. The evidence was inadmissible or the statute, as applied, is unconstitutional. Either alternative requires a reversal.

III

Prosecution of the Offense Charged in the Indictment Is Barred by Section 4(f) of the Internal Security Act.

Section 4(f) of the Internal Security Act (50 U.S.C., 783(f)) provides that, "Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute."

The gravamen of the indictment is that membership in a Communist organization (the Communist Party) with knowledge of its alleged illicit advocacy *does* constitute a violation of a criminal statute—i.e., the membership clause of the Smith Act. Accordingly, section 4(f) bars the prosecution of the offense charged in the indictment unless membership in the Communist Party, when accompanied by knowledge of the alleged illicit advocacy, is something more than membership "per se," and is therefore not included within the immunity which section 4(f) confers.

An examination of the language and legislative history of section 4(f) demonstrates that the purpose, intent and effect of the section was to bar the prosecution of offenses based on membership or officership in the Communist Party and specifically to bar the prosecution of Communists under the membership clause of the Smith Act.

It is obvious from the face of section 4(f) that Congress was of the opinion that membership per se did constitute a violation of some criminal statute other than the Internal Security Act. Otherwise, there would have been no point in the reference to "any other criminal statute." At the time the Internal Security Act was enacted, there was no statute in existence making membership in the Communist Party

criminal when not accompanied by knowledge of the alleged seditious character of its advocacy. The only criminal statute on the books which might have been applicable to members of the Communist Party by virtue of their membership was that portion of the Smith Act under which the indictment is laid.

It follows therefore that the reference in section 4(f) to "any other criminal statute" is meaningful only if it refers to the membership clause of the Smith Act. But, under that clause, membership in the Communist Party is not a crime unless the member has knowledge of the alleged seditious advocacy of the organization. Accordingly the term membership "per se" as used in section 4(f) must have been intended by Congress to embrace membership with knowledge of such seditious advocacy. A contrary construction would require treatment of the reference to "any other criminal statute" as surplusage and violate the familiar principle that, if possible, effect be given to all of the words of an enactment. *McDonald* v. *Thompson*, 305 U.S. 263, 266.

This is not to say that Congress intended section 4(f) to repeal the membership clause of the Smith Act. What it did clearly intend, however, was to make that clause unavailable for the prosecution of members of the Communist Party.

A construction of the term "per se" to exclude membership or officership with knowledge of the purpose of the organization is untenable for the further reason that it would negate the immunity which section 4(f) provides against prosecutions under section 4(a). Section 4(a) makes it a crime knowingly to conspire "to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictator-

ship" under foreign control. The relevance of membership or officership in a Communist organization to this offense results from the Internal Security Act's definition of Communist organizations (sec. 3(5)). These are organizations which operate for the purpose of advancing the objectives of the world Communist movement described in section 2 of the Act (secs. 3(3), 3(4), 3(4A)). Section 2 postulates a world Communist movement whose purpose it is "to establish a Communist totalitarian dictatorship in the countries throughout the world" which "will be subservient to the most powerful existing Communist totalitarian dictatorship" (secs. 2(1), 2(6)).

Thus, Communist organizations, by definition, are dedicated to the objective which section 4(a) forbids. Accordingly, persons who become or remain members or officers of such an organization with knowledge of its objective might, in the absence of section 4(f), be subject to prosecution for conspiring in violation of section 4(a). Obviously, however, membership or officership in an organization without knowledge that it has the purpose denounced by section 4(a) cannot be a crime under that section. Consequently, section 4(f) is meaningful in relation to violations of section 4(a) only if it provides immunity to a member or officer of a Communist organization who has knowledge of the organization's illicit purpose. This requires construing membership per se to include membership with such knowledge.

The structure and legislative history of the Internal Security Act confirm this reading of section 4(f).

The Act provides machinery for the compulsory registration of Communist-action and Communist front organizations, and imposes a duty on their officers to register the organizations. Upon the failure of a Communist-action

organization to register and list the names of all of its members, the individual members are required to register themselves. Onerous criminal penalties are imposed for failure of the organization's officers or members to comply with these requirements. (Secs. 7, 8, 15.) See *Communist Party* v. *Subversive Activities Control Board*, 351 U.S. 115. The legislative history reveals that the purpose of the immunity provision of section 4(f) was to insure the enforceability of these registration requirements by making the privilege against self-incrimination unavailable to officers and members as a defense against prosecution for failure to register.

The original Senate bill on which the Internal Security Act was based (S. 2311, 81st Cong., 1st Sess.) contained no immunity provision. However, the problem posed by the constitutional privilege against self-incrimination was raised early in the history of the legislation. John W. Davis, Esq., pointed out in a letter to the Senate Committee considering the bill that the provision for compulsory registration by individual members would compel self-incrimination under section 4(a) (Sen. Rep. No. 1365, 81st Cong., 2nd Sess. pp. 43-44).

As a result of the Davis letter and similar representations by others, the Senate Committee which had the bill under consideration added an immunity provision as section 4(f). This section provided that neither the holding of office nor membership in a Communist organization should constitute a violation of sections 4(a) or 4(c) (*id.*, p. 2). The Senate version, however, made no reference to "any other criminal statute."

The minority of the Senate Committee which reported out the bill stated in a minority report that the immunity given by section 4(f) was inadequate to bar an assertion

of the privilege against self-incrimination as a defense to a prosecution for failure to register. The minority pointed out that the problem of self-incrimination inherent in the registration requirement was created not only by sections 4(a) and 4(c), but by the membership clause of the Smith Act. Referring to the wording of section 4(f) in the Senate bill, the minority report stated:

> "It is clear that this provision is an inadequate substitute for the constitutional privilege against self-incrimination * * *. And, of course, section 4(f) does not even purport to avoid self-incrimination in relation to the membership clause of the Smith Act." Senate Report No. 2369, Part 2, 81st Cong., 2d Sess., pp. 12-13.

The same criticism of section 4(f) was made in the floor debate by Senators Kefauver, Humphrey and others (96 Cong. Rec. 14479, 15198).

Section 4(f) as reported out by the House Committee likewise limited the grant of immunity to prosecutions under sections 4(a) and 4(c) (96 Cong. Rec. 13752). In the course of the floor debate, Representative Celler read a letter from the Attorney General calling attention to the problem of self-incrimination created by the registration provisions of the bill. He then pointed out that the wording of section 4(f) would not resolve this problem since it did not grant immunity from prosecution under the membership clause of the Smith Act (96 Cong. Rec. 13739). It was only after this warning that the House amended the section by adding the phrase "or of any other criminal statute," which appears in the act as passed (96 Cong. Rec. 13761).

It is clear from the foregoing that Congress believed that the Fifth Amendment privilege compelled it to choose

between the registration provisions of the Internal Security Act and the membership clause of the Smith Act as the means for dealing with Communist Party members whose only overt act is that of membership in the organization. After lengthy deliberation, it chose the former, and therefore amended section 4(f) in a manner which it believed would immunize Communist Party members from prosecution under the membership clause of the Smith Act.

That this was the result that Congress intended and thought it had accomplished by section 4(f) is confirmed by the legislative history of the Communist Control Act of 1954. That Act had its origin in S. 3706, a bill to amend the Internal Security Act by making provisions with respect to so-called "Communist-infiltrated organizations" (100 Cong. Rec. 14208). At the inception of the Senate debate on this bill, an amendment was offered by Senator Humphrey (*ibid.*) which was later adopted by the Senate as an addition to the original bill (*id.*, p. 14234). The Humphrey amendment was prefaced by a Congressional finding reciting in substance that the Communist Party has for its purpose the violent overthrow of the Government (*id.*, p. 14208). The heart of the Humphrey amendment was contained in section 3, which read as follows (*ibid.*):

> "Whoever knowingly and wilfully becomes or remains a member of (1) the Communist Party, or (2) any other organization having for one of its purposes or objectives the establishment, control, conduct, seizure or overthrow of the Government of the United States, or the government of any state or political subdivision thereof, by the use of force or violence, *with knowledge of the purpose or objective of such organization*, shall upon conviction be punished as provided by the penalty provisions of Section 15 of the

Subversive Activities Control Act of 1950 (50 U.S.C. 794)." (Emphasis added.)[29]

Thus, the Humphrey amendment made membership in the Communist Party, when accompanied by knowledge of its alleged illicit purpose, a crime punishable by the penalties provided in section 15 of the Internal Security Act—i.e., by imprisonment of not more than 5 years or a fine of not more than $10,000. Accordingly, the crime which the Humphrey amendment proposed to create was identical with the crime charged in the indictment.

The Humphrey amendment precipitated a bitter controversy both within Congress and between the Administration and the Congressional proponents of the amendment. The Administration and the Congressional leadership opposed the amendment on the ground that it would destroy the effectiveness of the Internal Security Act. They argued repeatedly and at length that the Humphrey amendment would make membership in the Communist Party per se a crime. Thus, House Majority Leader Halleck stated (100 Cong. Rec. 14850):

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[29] The fact that knowledge of the alleged purpose of the Communist Party was an element of the offense defined in the Humphrey amendment is not only apparent from its text but was confirmed by the author in explaining his proposal in the floor debate: "*The language is quite plain.* Of course, it is predicated, as set forth in section 2, upon the findings of fact, which findings of fact already label the Communist Party as a conspiratorial force dedicated to the overthrow of the Government of the United States. Therefore, section 3 provides that whoever knowingly or wilfully becomes and remains a member *and has knowledge of the purpose and the objectives of such organization* ipso facto automatically becomes subject to the penalties. * * * How one thinks is entirely his own business. But if he maintains membership in an organization, and maintains it knowingly and willingly, and becomes and remains a member of an organization which has as its objective the overthrow of the government of the United States, *and does this with knowledge of the purposes of the organization,* then he is subject to the penalty." (100 Cong. Rec. 14232; emphasis supplied.)

> "As I read it [the Humphrey amendment], it does undertake to make membership in the Communist Party a felony per se."

Similarly, the Chairman of the House Judiciary Committee said (*id.*, 14643):

> "That provision [the Humphrey Amendment], as it passed the Senate, destroyed the very effective Subversive Activities Control Act of 1950, which specifically provided that membership in the Communist organization was not per se a violation of any criminal statute."

Accordingly, it was urged that the Humphrey Amendment would repeal an essential provision of section 4(f) and permit the successful assertion of the privilege against self-incrimination as a defense to a prosecution for failure to register. This position was stated and restated throughout the debate by many members of Congress, including Senator Butler, the author of S. 3706 and Senators Ferguson and McCarran, co-authors of the Internal Security Act. (100 Cong. Rec. 14211, 14222-23, 14566, 14578, 14643, 14652, 14658, 14723, 14850). All of these Senators and Representatives stated that they not only spoke for themselves but were expressing the views of the Attorney General and the Administration. Excerpts from four typical statements are contained in Appendix B, *infra*.

Congress accepted and acted upon the representations and arguments of its leaders and the Attorney General. It revised the Humphrey amendment, and enacted a law which eliminated all criminal sanctions for membership in the Communist Party. (See sections 3 and 4 of the Communist Control Act of 1954; 50 U.S.C. 842, 843.)

It is plain that the debate and the action of Congress on the Humphrey amendment were predicated on the assumption that section 4(f) of the Internal Security Act prohibits the prosecution of Communists under the membership clause of the Smith Act. If Congress had believed prosecution under that clause permissible notwithstanding section 4(f), the controversy around the Humphrey amendment would have been pointless. For the controversy and its resolution were based on the proposition that, by virtue of section 4(f), membership in the Communist Party with knowledge of its alleged illicit purpose was not a crime and that it should not be made a crime.

The opinion below (R. 447-48), citing *Scales* v. *United States*, 227 F. 2d 581 and *United States* v. *Lightfoot*, 228 F. 2d 861, held that the crime charged is not within the provision of section 4(f) because membership per se does not include membership with knowledge of the organization's forbidden purpose. None of these decisions attempts to reconcile this construction with (a) the reference in section 4(f) to "any other criminal statute," (b) the immunity which the section purports to confer against prosecution under section 4(a), or (c) the legislative history which we have reviewed.

The court below (*ibid.*) also relied on the savings clause of the Internal Security Act (50 U.S.C. 796) to support its conclusion. The clause provides that the Act "shall be construed as being in addition to and not in modification of existing criminal statutes." These words, however, do not nullify the reference in section 4(f) to "any other criminal statute." It is a familiar principle of statutory construction that specific provisions prevail over general language used in the same statute. *Ginsberg & Sons* v. *Popkin*, 285 U.S. 204, 207. Accordingly, a general saving clause cannot

override express provisions found in the body of the enactment. *United States* v. *Yuginovich*, 256 U.S. 450, 463.

In its Brief on Reargument in *Scales*, the Government contends (p. 35) that Congress in section 4(f) simply "recited that the bare fact leading to registration, i.e. membership, is not per se a crime." But this was already perfectly apparent from the texts of the membership clause and section 4(a). Thus, the contention assumes that the only Congressional purpose in enacting section 4(f) was to reiterate the obvious. The assumption violates an elementary principle of statutory construction. It also flies in the face of the legislative history which demonstrates that section 4(f) was not intended as a redundancy but to afford members and officers of Communist organizations an immunity from prosecution which was not otherwise available to them and which was deemed necessary to the validity of the provisions requiring them to register.

The Government also suggests (*ibid.*) that section 4(f) may not have accomplished the ultimate legislative purpose because the immunity conferred is not broad enough to foreclose a claim of privilege against compulsory registration. That may well be.[30] But the fact that section 4(f) proves legally insufficient to accomplish the result that Congress expected of it does not militate against giving effect to the limited immunity that the section affords. *United States* v. *Bryan*, 339 U.S. 323, 335-37.

[30] The question is presented in the petition for certiorari in *Communist Party* v. *Subversive Activities Control Board*, No. 537, this Term.

IV

The Membership Clause of the Smith Act Is Unconstitutional on Its Face and as Applied.

The text of the membership clause states an offense consisting solely of holding membership in an organization with knowledge that it advocates forcible overthrow. As written, the clause does not require proof of criminal intent or of any overt act on the part of the accused other than the act of becoming or remaining a member. It authorizes the conviction of one who is opposed to violent revolution and who joined the organization for some entirely legitimate purpose. Likewise, a conviction is authorized notwithstanding that the accused is a passive member or confines his activities to lawful and peaceable advocacy and conduct.

In an attempt to obviate the glaring infirmities which appear on the face of the statute, the Government proposes to embellish it with two further ingredients. First, it would add a specific intent as an element of the offense and has alleged in the indictment (R. 1) that petitioner intended "to bring about such overthrow by force and violence as speedily as circumstances would permit". Second, in briefs and argument in this Court, the Government has proposed to limit the reach of the statute to "active" members whom it defines as those who devote "all, or a substantial part of [their] time and efforts to the [organization]" (G. Br. Rearg.,[31] pp. 22-24).

The membership clause, both as written and with these embellishments, differs in vital respects from the "advo-

[31] We so designate the brief for the United States on reargument in *Scales*, No. 8, this Term. "1958 Br." designates the Government's original brief in *Scales* No. 488, Oct. Term, 1958.

cacy" and "organizing" provisions of the Smith Act which were sustained in *Dennis* v. *United States, supra.* The latter prohibit advocacy of forcible overthrow and the organization of a group which engages in such advocacy. They punish individuals for their own advocacy or for organizing to engage in advocacy. Accordingly, the question considered in *Dennis* was whether the advocacy of forcible overthrow might constitutionally be punished.[32]

The membership clause, on the other hand, does not punish advocacy but membership. As written, or with the interpolations supplied by the Government, the clause penalizes an individual, not for his advocacy, but because of the advocacy of other members of the group to which he belongs. Thus, it is not advocacy but association that the clause makes criminal.

Association with a group engaged in advocacy is within the protection of the First Amendment. *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, 460, citing *De Jonge* v. *Oregon*, 299 U.S. 353, 364 and *Thomas* v. *Collins*, 323 U.S. 516, 530. Group association, of course is also a "liberty" protected by due process. *De Jonge* v. *Oregon, supra,* at 364. Accordingly, the constitutional issues which this case presents are (a) whether the First Amendment or due process permits the proscription of association of the kind which the statute punishes and, if so, (b) whether the statute was constitutionally applied to petitioner.

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[32] The *Dennis* defendants were indicted for conspiring to violate the "advocacy" and "organizing" provisions of the Act. The trial court construed the indictment as charging a conspiracy which had advocacy as its sole object, the conspiracy to organize being a "mere preliminary" to the conspiracy to advocate. *United States* v. *Dennis*, 9 F.R.D. 367, 376. Furthermore, this Court treated the conspiracy as an agreement to advocate forcible overthrow in the present, not in the future. See *Yates* v. *United States, supra,* at 324.

Resolution of these constitutional issues depends upon the answers to the questions stated in the Court's order of June 29, 1959, 360 U.S. 924, setting *Scales* for reargument.[33] In what follows, we address ourselves to these questions, although not in the sequence which the order enumerates. We will first show that, on its face and as applied, the statute, as embellished by the Government, contravenes the clear and present danger doctrine (paragraphs 2 (first question), 3 (first question) and 4 of the Court's order). We next show that the statute, as embellished, also imputes guilt solely from association (paragraphs 2 (first question) and 3 (first question) of the Court's order). We then show that the statute, as written, is unconstitutional for additional reasons (paragraph 1 of the Court's order). Finally, we show that the interpretations urged by the Government are impermissible (paragraphs 2 (second question) and 3 (second and third questions) of the Court's order).

A. The statute as interpreted by the Government contravenes the clear and present danger doctrine

1. *The applicability of the doctrine*

Answers to questions posed in the first sentence of paragraph (4) of the Court's order lie at the threshold of the inquiry into the validity of the membership clause under the First Amendment: "Whether the 'clear and present danger doctrine' . . . has application to the Membership Clause, either with respect to the accused or with respect to the 'society, group or assembly of persons' described in the statute."[34]

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[33] The text of the order is set forth in Appendix C, *infra*.

[34] Our concern at this point is with the applicability of the doctrine and not with the nature of the considerations which it embodies. As we later show, the statute contravenes the doctrine both as originally enunciated and as re-interpreted in *Dennis*.

(a) The phrase "clear and present danger" is a shorthand description of the guiding considerations for determining whether the restraint of an activity within the area protected by the First Amendment is constitutional. So far as we are aware, all of the cases in which a majority of the Court have explicitly applied the doctrine involve restraints on speech or the press. But the doctrine is equally applicable to restraints on the right of assembly or association.[35] This is so because the specific command of the Amendment embraces all of the rights which it protects and because these rights are inseparable, occupying the same high place on the scale of values of a democratic society. *Thomas* v. *Collins*, *supra*, at 530.

Accordingly, Mr. Justice Brandeis held that "assembling with a political party" is a right protected by the First Amendment which may not be invaded where it appears that the invasion cannot find justification in clear and present danger. *Whitney* v. *California*, *supra*, at 378-9 (concurring opinion). Since the membership clause punishes "assembling with a political party," it follows that the clear and present danger doctrine must be applied in determining the constitutionality of the statute on its face and as applied to petitioner.

The Government argues (G. Br. Rearg., p. 30) that if the specific intent charged in the indictment can be imported into the membership clause, the clear and present danger doctrine becomes inapplicable. The same argument was advanced in *Dennis* (brief for the United States, pp. 270-88). Although not discussed in any of the opinions, it is obvious that the argument was rejected. For the prevailing opinion applied the clear and present danger doc-

[35] The Court has used the two terms interchangeably. See, e.g., *N.A.A.C.P.* v. *Alabama*, *supra*, at 460. Because "association" more accurately describes the membership relation, we use it in referring to the right which the membership clause restrains.

trine (at 502-11) notwithstanding its holding (at 499-500) that the defendants had the same specific intent which the indictment in the present case charges to petitioner.

The fallacy of the Government's argument is likewise demonstrated by *Schenck* v. *United States*, 249 U.S. 47, which it cites as supporting its position (G. Br. Rearg., p. 18). For Justice Holmes found (at 51) that Schenck circulated his document with the intent of obstructing the draft. If the Government is right, that finding would have disposed of the case and it would have been unnecessary to "add a few words" (at 52) enunciating the clear and present danger doctrine and stating unequivocally that it is applicable "in every case" involving speech.[36]

The Government relies on a remark in the dissent in *Abrams* v. *United States*, 250 U.S. 616, 627-28, that speech may be punished if it "produces or is intended to produce a clear and imminent danger" and on a similar remark in the concurring opinion in *Whitney* v. *California*, *supra*, at 373 (G. Br. Rearg., pp. 18-19). At most, these remarks mean that an intent to produce an *imminent* danger dispenses with the necessity of proof that the danger, in fact, was immediate.[37] However, the intent to which Justices

[36] The sentence in *Schenck* which the Government quotes (G. Br. Rearg., p. 18) confirms this reading of the opinion. For it speaks of "tendency" and "intent" in the *conjunctive*. In context, "tendency" plainly refers to clear and present danger. The point of the sentence is that where both elements are present, proof that the words used actually resulted in the evil apprehended is unnecessary. Similarly, in *Pierce* v. *United States*, 252 U.S. 239, 253 (dissenting opinion), Mr. Justice Brandeis stated that both the existence of a clear and present danger and an intent to produce the forbidden result are necessary to support a conviction in a speech case.

[37] The Government seems to recognize this at one point in its argument. After stating that specific intent makes the clear and present danger doctrine wholly inapplicable, it goes on to say that intent only "dispenses with the occasion for the *additional qualification* that the danger be immediate" (G. Br. Rearg., p. 30, emphasis supplied).

Holmes and Brandeis referred is not the intent which the Government reads into the statute and has charged in the indictment. Petitioner and the Communist Party are not alleged to have intended to bring about forcible overthrow immediately, but only "as speedily as circumstances would permit" (R. 1). Hence, if the statements in *Abrams* and *Whitney* can be construed to qualify the clear and present danger doctrine,[38] the qualification has no application to the membership clause, even if it imports the kind of specific intent which the Government seeks to interpolate.[39]

(b) We have demonstrated that the clear and present danger doctrine is applicable to the membership clause. It remains to identify the act or acts described in the clause which must be looked to for the source of the danger, if any.

The words "clear and present" have been variously interpreted. Cf. *Whitney* v. *California, supra,* at 375-79 (concurring opinion) with *Dennis* v. *United States, supra,* at 508-11. But whatever the nature of the considerations embodied in the doctrine may be thought to be, it is clear that they focus upon the consequences of the particular act which is the object of the restraint in question. This must be so because, under the doctrine, the validity of the restraint is determined by the nature of the danger, if any, which will result from performance of the act sought to be restrained.

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[38] The defendant in *Schenck* certainly intended to obstruct the draft immediately. And see *Pennekamp* v. *Florida*, 328 U.S. 331 and *Craig* v. *Harney*, 331 U.S. 367 which reversed contempt convictions because the newspaper articles in question did not meet the clear and present danger test although they were published with the intent of influencing court action in pending cases.

[39] It was doubtless because the same kind of intent was involved in *Dennis* that the Court found it unnecessary to discuss the Government's contention when advanced in that case.

Accordingly, where speech is punishable, "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Schenck* v. *United States, supra*, at 52. Similarly, in the case of the membership clause which punishes association, the question must be whether the association occurs in such circumstances and is of such a nature as to create a clear and present danger of substantive evils within the competence of Congress.

The substantive evils which the Smith Act seeks to prevent are attempts to overthrow the Government by force and violence. *Dennis* v. *United States, supra*, at 509. The Act does not attack the evil directly (cf. 18 U.S.C. 2384) but by making it criminal to advocate, organize to advocate, distribute literature advocating, or to be a member of a group which advocates forcible overthrow,[10] or to conspire to commit any of these acts. *Dennis* held that advocating or organizing to advocate the proscribed doctrine may, under some circumstances, create a clear and present danger of attempted forcible overthrow. That holding validates the "advocacy" and "organizing provisions of the Act. It does not follow, however, that all of the other proscriptions of the Act are likewise constitutional merely because the statute links them in some fashion to the forbidden advocacy. The validity of each must be judged independently by determining whether the conduct which it punishes is of such a nature that it can, under any circumstances, create a clear and present danger of the evil which Congress sought to prevent.

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[10] For the purpose of the present analysis the factors of knowledge, intent and "activity" may be disregarded since they have no relevance in identifying the act or acts which must be looked to for the source of the danger, if any

The *Dennis* case itself demonstrates this proposition. The indictment charged a conspiracy to violate the "advocacy" and "organizing" provisions of the Act. The Court found that the substantive offenses were constitutional because, under given circumstances, the punishable conduct can create a clear and present danger. The question before the Court, however, was the constitutionality of a statute punishing a conspiracy to commit these substantive offenses. The Court did not resolve this question on the ground that because the substantive offenses were sufficiently dangerous and the conspiracy immediately anterior to their commission, the conspiracy could constitutionally be punished. Instead, the Court examined the conspiracy itself in order to determine whether *it* gave rise to a clear and present danger. The conspiracy provisions of the Act were upheld (at 511) only because, "It is the existence of the conspiracy which creates the danger."

The decision in *Yates* gives further confirmation to our contention. There, the Court (at 324) noted that the conspiracy charged, like the conspiracy in *Dennis*, was "a conspiracy to advocate presently the taking of forcible action in the future." The Court added (*ibid.*), "We intimate no views as to whether a conspiracy to engage in advocacy in the future, where speech would thus be separated from action by one further remove, is punishable under the Smith Act." There would have been no occasion for this reservation if all clear and present danger questions that arise on the face of the Act had been resolved by the determination that advocacy of forcible overthrow, under certain circumstances, can meet the test. The reservation was necessary because the constitutionality of proscribing the exercise of a First Amendment right "separated from action by one further remove" required an adjudication as to whether the exercise of that right can *itself* create a clear and present danger.

Membership in an organization that advocates forcible overthrow is at least one remove from the advocacy. Hence, it is the membership and not the advocacy which must be looked to for the source of the danger in a prosecution under the membership clause.

Although *De Jonge* v. *Oregon*, 299 U.S. 353, was not decided in terms of the clear and present danger doctrine, the principle which it establishes is decisive of the question under discussion. De Jonge was convicted of the offense of assisting in the conduct of a meeting of an organization that engages in seditious advocacy. The evidence showed that he had spoken at a peaceable meeting of the Communist Party, an organization which the state court found to be engaged in advocatin, illegal action. The Court (at 365) accepted this finding and recognized (at 363) that it might justify punishing the organization for such advocacy. Nevertheless, the Court invalidated the statute as applied by the state court because it authorized a conviction for assisting in the conduct of a lawful and peaceable meeting, although held under the auspices of the seditious advocate. The Court said (at 364-65):

> "These [First Amendment] rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed."

Herndon v. *Lowry*, 301 U.S. 242, 258-59, summarizes the holding in *De Jonge* as follows:

> "The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined

> character must find its justification in a reasonable apprehension of danger to organized government. . . . If, therefore, a state statute penalizes innocent participation in a meeting held with an innocent purpose merely because the meeting was held under the auspices of an organization membership in which or the advocacy of whose principles, is also denounced as criminal, the law, so construed and applied, goes beyond the power to restrict abuses of freedom of speech and arbitrarily denies that freedom."

Thus, the constitutional question which the statute in *De Jonge* presented was not whether the advocacy of the Communist Party created a danger to the Government. This question was irrelevant under a statutory provision which did not penalize advocacy. The only relevant question was whether the act which the statute punished—association with the Communist Party in the conduct of its meetings—was itself dangerous. So, under the membership clause, the issue is not whether the advocacy of the organization can give rise to a clear and present danger of forcible overthrow. The issue is whether individual membership in the organization is of itself creative of such danger.

The Government contends (G. Br. Reargt., pp. 31-32) that the clear and present danger doctrine cannot be applied "with regard to the danger to be anticipated . . . from the membership of this particular petitioner." The only reason it assigns for this conclusion (p. 32) is that, "It would be the same as writing the Act off the books to require that the government prove that it is in danger of overthrow from the activity of any individual." This begs the question. If the clear and present danger doctrine, as properly applied, cannot ever justify a conviction for violation of the

membership clause, the clause must be written off the books because it is unconstitutional on its face.

The Government says (*ibid.*) that "the 'danger' test is to be applied to the organization."[41] But an organization, as such, cannot be "dangerous". Danger can arise only from some unlawful activity in which the organization is engaged. It is the activity, not the organization, which is the source of the danger. The only organizational activity to which the membership clause refers is the advocacy of forcible overthrow. Hence, the Government's argument comes down to the proposition that it is this advocacy which must be looked to for the source of the danger. As we have demonstrated, however, that proposition is fallacious.[42]

The Government further argues (p. 32) that, "This petitioner's membership is his contribution to the common end, and it is his membership, plus that of his associates, that gives the Party power." This seems to say that an organization with only a few members is powerless to create a danger, but that the aggregate "contributions" of a suffi-

[41] The Government asserts: "This has been the uniform practice in this type of case. *Gitlow* v. *New York*, 268 U.S. 652; *Whitney* v. *California*, 274 U.S. 357; cf. *American Communications Association* v. *Douds*, 339 U.S. 382." Of course, none of these were "membership" cases. And the only opinion in any of them which applied the clear and present danger doctrine was the dissent in *Gitlow* which held the doctrine applicable, in an "advocacy" case, to the advocacy with which the accused was charged, without reference to the organization of which he was a member.

[42] By the reference (G. Br. Rearg., p. 32) to its 1958 Brief, pp. 39-45, the Government seems to assert that the source of the danger is not the advocacy of the organization but its alleged commission or readiness to commit espionage, sabotage and crimes involving "a direct and violent assault on our security and institutions." The danger from conduct of the sort so luridly described would, of course, justify statutes punishing espionage, sabotage, conspiracies to overthrow the Government and the like. But it cannot justify the membership clause which punishes an accused without regard to organizational conduct of the sort described or the accused's knowledge of such conduct.

ciently large membership "gives the Party power." By "power" the Government can only mean power to implement the organization's advocacy of violent overthrow, thus making the advocacy dangerous. Again, therefore, the argument comes back to the erroneous assertion that it is the existence of a clear and present danger from the advocacy of the organization and not from membership in it which is relevant under the membership clause.

Furthermore, the Government does not and cannot demonstrate that the danger from the illegal advocacy of an organization rises in proportion to the size of its membership. The Government recognizes (*ibid.*) that a nominal member makes no "contribution" at all to the danger. Accordingly, "contributions" are made only by "active" members. By definition (G. Br. Rearg., p. 23), a member is "active" who engages in nothing but lawful and constitutionally protected activity on behalf of the organization. On the Government's theory, therefore, organizational advocacy of forcible overthrow, not dangerous of itself, creates a clear and present danger when the organization has a sufficiently large, but unspecified, number of members who confine themselves to innocent activity. This is absurd.

The theory of the Government contravenes the decision in *De Jonge*. De Jonge made a "contribution" to the Communist Party by assisting in the conduct of its meeting and lending it the prestige of his presence on the platform. All other persons who assisted in conducting Party meetings made similar "contributions." But the Court did not test the validity of the statute by measuring the aggregate effect of "contributions" made to the unlawful objective of the organization by persons who assisted in the conduct of its meetings. The Court asked only whether performance by the accused himself of the act which the statute punished was an abuse of his First Amendment rights—

i.e., whether it endangered the Government. The same inquiry is determinative of the constitutionality of the membership clause.

2. *The statute on its face*

It is too plain for argument that if, as we have shown, the clear and present danger doctrine is applicable to the membership of the accused, the membership clause is unconstitutional on its face. This is true whether or not specific intent and "activity" can be read into the statute. For, as the Government concedes (G. Br. Reargt., p. 32), there can never be "danger of overthrow from the activity of any individual."

The membership clause with the proposed embellishments is likewise invalid, if it be assumed that the relevant "danger" is not individual membership but organizational advocacy of forcible overthrow. This result is required by the decision in *De Jonge* which assumes that the advocacy of forcible overthrow may be proscribed but holds that this does not justify a statute which punishes a person for active association with an organization engaged in such advocacy when he has not personally participated in it. That case is simply an application of the general principle that statutes affecting the rights of speech, press and assembly must be narrowly drawn so as not to invade these rights except to the extent necessary to curb their abuse. *Stromberg* v. *California*, 283 U.S. 359; *Winters* v. *New York*, 333 U.S. 507; *Herndon* v. *Lowry*, *supra*. In line with this principle, too, "the availability of more moderate controls than those which the state has imposed" is one of the considerations embodied in the clear and present danger doctrine. Freund, *On Understanding the Supreme Court*, quoted in *Dennis* v. *United States*, *supra*, at 542-43 (concurring opinion).

The "danger" from organizational advocacy of forcible overthrow can be prevented by statutory provisions narrowly drawn to prohibit such advocacy. In fact, the Government is fully protected against danger from that source by the "advocacy" and "organizing" provisions of the Smith Act and the general conspiracy statute.[43] Hence, the membership clause is an unnecessary and, therefore, an unconstitutional invasion of the member's right of association.

3. *The statute as applied*

Dennis held, on the facts of that case, that a conspiracy to advocate forcible overthrow "as speedily as circumstances would permit" satisfied the clear and present danger doctrine as re-interpreted in the prevailing opinion. The holding (at 511) was based (1) on the finding that the conspiracy was "highly organized . . . with rigidly disciplined members subject to call when the leaders, these petitioners, felt that the time had come for action, coupled with" (2) "the inflammable nature of world conditions."

The evidence in the present record and the state of our foreign relations at the time the indictment was returned establish that petitioner's conviction contravened the clear and present danger doctrine as formulated in *Dennis*. This is so whether the doctrine is applied with respect to the conduct of petitioner or the advocacy of the Communist Party.

The only evidence of petitioner's activities within the period not barred by the statute of limitations was the following: (1) In September, 1951, he solicited a ten dollar contribution to the Party from Chatley and discussed the endorsement of American Labor Party candidates with that

[43] The Government has tried the Smith Act conspiracy cases on the theory that the Communist Party was the conspiratorial group. See, e.g., *Yates* v. *United States*, *supra*, at 329.

witness (R. 302-03). (2) In September, 1951, he told Regan that "he was going under a disguise to conceal himself" (R. 368). (3) A month later, he picked up some Party publications which his wife had left for him at the Regan home and told Regan that "he had to be on the move" (R. 369). (4) In 1953-55, he lived in New Jersey where he was employed by the Goodyear Rubber Company under an assumed name (*supra*, p. 8). Obviously, none of these activities is remotely dangerous.

The only evidence concerning the advocacy of the Party within the statutory period was that the Party Chairman had advocated the achievement of socialism by peaceable and constitutional means (*supra*, p. 8). There was no evidence whatsoever of activity by other Party members or of the size of the membership during the statutory period. Hence, there is no basis in the record for any estimate as to the aggregate "contribution" of all Party members to the forbidden objective.

Moreover, *Dennis* did not hold that the conspiracy proved in that case would give rise to a clear and present danger under all circumstances. It held (at 511) only that the conspiracy created such a danger in the context of the then "touch and go nature of our relations" with the Soviet Union. Judge Hand stated the issue as follows (183 F. 2d 201, 213):

> "We need not say that even so thoroughly planned and so extensive a confederation would be a 'present danger' at all times and in all circumstances; the question is how imminent: that is how probable of execution—it was in the summer of 1948, when the indictment was found."

After posing this question, the court found that in the summer of 1948 (*ibid.*):

> "Any border fray, any diplomatic incident, any difference in the construction of the modus vivendi—such as the Berlin blockade we have just mentioned—might prove a tinder box, and lead to war."

The international setting in November, 1954, the date of the indictment in this case, was materially different from that of 1948-1951 on the basis of which the *Dennis* conviction was affirmed.

The Korean truce took effect in July 1953. By 1954, a marked relaxation of international tensions had occurred, leading to the Geneva conference in the spring of that year and the establishment of peace in Indo-China. In October, 1954, the President stated (*N.Y. Times*, October 21, 1954):

> "For the first time in twenty years, there has been for some months no active battlefield anywhere in the world. Moreover, while fighting has been brought to a halt during the past twenty-one months, still other developments favorable to the maintenance of peace have been brought about through understanding and through persistent and patient work, in which your government has been a helpful participant."

In his State of the Union Message on January 5, 1955, the President was able to report (*N.Y. Times*, Jan. 6, 1955):

> "There has been progress justifying hope for continuing peace and for the ultimate rule of freedom and justice."

The progress to which the President referred made possible the July, 1955 "summit" conference at Geneva, accompanied by the further relaxation of tensions and recession of the danger of war. Thus, the background factors which the Court held essential to the constitutionality of the convic-

tions in *Dennis* were no longer in existence at the time the indictment here was returned. Cf. *Chastleton Corporation v. Sinclair*, 264 U.S. 543.

The prevailing opinion in *Dennis* (at 510) weighed "the gravity of the 'evil' discounted by its improbability" against the values inherent in the guarantees of the First Amendment. It held that the threat to the nation from the conspiracy of the defendants at a time when war seemed imminent tipped the balance in favor of security as against individual liberty.

The present case requires a different weighting. On the one hand, the danger of the effectuation of the "evil" from the activities of the petitioner or the Communist Party, as disclosed by the evidence, is altogether improbable under any circumstances, let alone in the setting of the new and improved international situation that has prevailed since 1954. On the other hand, greater weight must be given to the preservation of our democratic freedoms, now that the conflict between the capitalist and socialist worlds has moved to a new plane where, as the leaders on both sides recognize, the issue will be decided, not by arms, but by superiority of social, political and economic institutions and practices.[14] Indeed, the First Amendment has become one of our most potent weapons in what the Chief Justice has called "a contest for the hearts and minds of men."[15]

Accordingly, even under the reformulation of the clear and present danger doctrine which *Dennis* enunciated, the balance which must be struck in this case requires an ac-

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[14] Secretary of State Herter recently stated in a major policy address: "As we move forward in what may become a new era of competitive peace, our chief source of strength will not lie in material things—but in our faith in freedom." *New York Times*, November 17, 1959.

[15] Address to the American Bar Association, 40 A B.A. Jour. 953

quittal. However, should the Court think otherwise, we urge it to reconsider the holding in *Dennis*.

As all four opinions in that case recognized, the interpretation given the clear and present danger doctrine by the prevailing opinion bears little resemblance to the conception of Justices Holmes and Brandeis which the Court adopted in subsequent cases. See, e.g., *Thomas* v. *Collins*, *supra*; *Bridges* v. *California*, 314 U.S. 252. The Court has had no occasion to consider or apply the reformulation of the doctrine since *Dennis*. The prevailing opinion attracted the adherence of but four Justices. Only three members of the present Court participated in the case, all of whom rejected the interpretation given the doctrine by the then Chief Justice. Finally, the decision bears the imprint of the crisis of its time when the war in Korea was thought by many to be the first engagement in an inevitable World War III.

These considerations point up the need for a re-examination of *Dennis* should the Court, in this case, reach the question of the meaning of "clear and present danger."

B. THE STATUTE AS INTERPRETED BY THE GOVERNMENT IMPUTES GUILT SOLELY FROM ASSOCIATION

The imputation of guilt solely from association violates the First Amendment by punishing the exercise of a right which the Amendment protects. It also violates due process by unreasonably depriving an accused of the "liberty" of association. *N.A.A.C.P.* v. *Alabama*, *supra*.

Conspiracy law punishes association in furtherance of a criminal enterprise. But, "[g]uilt with us remains individual and personal, even as respects conspiracies." *Kotteakos* v. *United States*, 328 U.S. 750, 772. This is true because a conspirator is punished, not for association with his co-conspirators, but for his personal participation in

an agreement to commit a crime, when followed by an act of the conspirators in furtherance of the agreement. In contrast, as we will show, the membership clause proscribes association with—i.e., membership in—a group which advocates forcible overthrow even though the accused has not agreed to such advocacy or performed any act in furtherance of it. Accordingly, the statute penalizes association with the group for any purposes, including those that are innocent. It is because of this fact, as a number of distinguished commentators have noted, that the membership clause introduced the "abhorrent" doctrine of guilt by association into the federal criminal law.[46]

It is clear that the membership clause as written imputes guilt solely from association. For it authorizes a convic-

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[46] "This idea that guilt is not necessarily personal, but can result from association, is absolutely abhorrent to every American tradition or conception of criminal justice before 1918. Unfortunately, in that hysterical period it got into our deportation statutes and state syndicalism acts; but the operation of both kinds of laws is not a cause for pride, and might well have deterred Congress from passing this part of section 2 [the membership clause]. It is the first time that guilt by association was ever introduced into a federal criminal law. Neither the Sedition Act of 1798 nor the Espionage Acts of 1917 and 1918 included such a conception. We got safely through the Civil War and the World War without finding it necessary to create group guilt outside the limits of an actual conspiracy." Chaffee, *Free Speech in the United States* (1954), p. 470. For a detailed critique of the membership clause, see the same volume at 470-84. "Whatever its [the Smith Act's] merits otherwise, Congress had now for the first time made 'membership' or 'affiliation with' certain organizations a criminal offense. Abhorrent, for generations and imported from the Immigration Act of 1918, 'guilt by association' became part of the law applicable to citizens." O'Brian, *New Encroachments on Freedom*, 66 Har. L. Rev. 1, 18. Guilt by association "appeared in our law only in 1940; since then it has grown and spread until this cloud, no larger than a man's hand, covers the whole horizon." Commager, *The Pragmatic Necessity for Freedom*, in *Civil Liberties Under Attack* (1951), p. 17. See also, Acheson, *A Democrat Looks at His Party* (1955); pp. 172-73; Biddle, *The Fear of Freedom* (1951), pp. 92, 105-06.

tion merely on proof of membership and knowledge of the proscribed advocacy, notwithstanding that the accused does not believe in such advocacy, does not intend by his membership to bring about violent overthrow, and is a passive member or one who confines his activity in the group to furtherance of its peaceable advocacy. Cf. *Herndon* v. *Lowry*, *supra*, at 259; *Stromberg* v. *California*, *supra*; *Adler* v. *Board of Education*, 342 U.S. 485.[47]

The additional ingredients which the Government proposes to supply do not cure the defect apparent from the face of the statute.

The specific intent which the Government reads into the membership clause cannot substitute for participation in the illegal agreement required in conspiracy cases. For that intent is not an intent to further the forbidden *advocacy* of the group. It is an intent to bring about the substantive evil—forcible overthrow. Moreover, the intent proposed is not even an intent to bring about the substantive evil through or with the aid of the organization of which the accused is a member. It is merely a generalized intent to bring about forcible overthrow by some unstated means.[48] Thus, an accused may be convicted although he believes that the advocacy of forcible overthrow is premature and that the group should confine itself to peaceable advocacy and activity in order to attract adherents until the moment is ripe to make the attempt. Cf. *United States* v. *Silverman*, *supra*, at 686; *Yates* v. *United States*, *supra*,

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[47] We discuss these cases *infra*, pp. 75-76, in demonstrating the fallacy of the Government's contention (G. Br. Rearg., pp. 5-12) that the membership clause is constitutional without a specific intent requirement.

[48] This is clear not only from the indictment (R. 1) but from the instructions (R. 423) which enumerated (1) membership with knowledge and (2) intent to bring about overthrow as two distinct and disparate elements of the offense.

at 324, 330. Likewise, a conviction may be had where the accused does not regard the group as a feasible instrumentality for forcible overthrow and intends to accomplish his objective by some other means. Obviously, participation in an agreement to advocate forcible overthrow cannot be imputed to an accused from his membership in the group, when accompanied by intent of the kind just described. To permit a conviction for such an intent, not accompanied by any act in furtherance of it, would be to introduce archaic concepts of constructive treason into the federal criminal law.[49]

Even if the intent which the Government interpolates could somehow be twisted into an intent to further the illegal advocacy of the group, it would still not validate the statute as one which, in effect, punishes conspiracies. For this intent, plus membership with knowledge of the group's illegal advocacy, could not constitutionally give rise to a conclusive presumption that the accused thereby became a party to an agreement to engage in such advocacy. The question would still be one for the jury, just as participation by an accused in the conspiratorial agreement is a jury question in every conspiracy case, no matter how compelling the evidence may be. Since the membership clause, as construed by the Government, substitutes a conclusive presumption for jury determination of this question, the statute violates due process. Cf. *Tot* v. *United States*, 319 U.S. 463.

The Government's "activity" factor is of no help in reconciling the statute with the constitutional principle that guilt is personal and bringing it within the ambit of conspiracy

[49] "The jury . . . must have supposed it to be within their province to condemn men not merely for disloyal acts but for a disloyal heart; provided only that the disloyal heart was evidenced by some utterance. To prosecute men for such publications reminds of the days when men were hanged for constructive treason." *Schaefer* v. *United States*, 251 U.S. 466, 493 (dissenting opinion).

law. By definition (G. Br. Rearg., p. 23), a member is "active" who confines himself to innocent and constitutionally protected activity and advocacy. Moreover, the definition does not require "activity" to be in furtherance of the group's illegal advocacy or illegal objective. It is enough (G. Br. Rearg., p. 24) that an accused has "devoted all, or a substantial part, of his time and efforts to the Party." Thus, the "activity" factor is satisfied by lawful conduct in furtherance of a lawful objective of the group.

The Government assumes (G. Br. Rearg. p. 23) that "active support of any kind aids the organization in achieving its own illegal purposes." This assumption is unwarranted in fact[30] and is contrary to the decision in *De Jonge*. At most, the purpose and effect of the member's activity presents a jury question, just as it is for the jury to determine, in conspiracy cases, whether the alleged overt acts were in furtherance of the object of the conspiracy.[31] But the "activity" factor removes this question from the consideration of the jury. Accordingly, in addition to its other infirmities, the factor has the vice of depriving an accused of jury trial of a fact essential to guilt.

It is clear from the foregoing analysis that the proposed embellishments of the membership clause, do not give it any resemblance to a conspiracy statute. In fact, the Government's defense of the clause as a conspiracy law does

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[30] Cf. *Bridges v. Wixon*, 326 U.S. 135, 147: "It (Marine Workers' Industrial Union) was found to have, and we assume it did have, the illegitimate objective of overthrowing the government by force. But it also had the objective of improving the lot of its members in the normal trade union sense. One who cooperated with it in promoting its legitimate objectives certainly could not by that fact alone be said to sponsor or approve of its general or unlawful objectives."

[31] The Government is oblivious of this fact when it attempts to analogize its "activity" factor to overt acts in conspiracy cases (G. Br. Rearg., p. 23, ftn. 10).

not rest on these embellishments, but on an inference it draws from the supposed peculiar characteristics of membership in a particular organization—the Communist Party (1958 Br., pp. 49-50). Membership in that organization, it is asserted, "entails . . . tightly disciplined, quasi-military, deeply conspiratorial activities" and therefore "partakes of the concert-of-action, combination, and acting-together which characterize conspiracy" (*id.*, p. 53).[52] The statute, however, authorizes a conviction without proof that the membership of the accused entailed "conspiratorial activities" and without a jury finding that he was in fact a party to a "combination" in furtherance of the forbidden objective. Thus, on the Government's own showing, a conviction may be had for a crime neither charged nor proved. This is a blatant denial of due process. *De Jonge* v. *Oregon*, *supra*, at 362; *Cole* v. *Arkansas*, 333 U.S. 196; *Herndon* v. *Lowry*, *supra*.

The argument of the Government that a Communist Party member is *ipso facto* a conspirator relies largely on Justice Jackson's partial concurrence in *A.C.A.* v. *Douds*, *supra* (1958 Br., pp. 43, 49, 53).[53] But the Government ignores the passages in the opinion which demonstrate that, notwithstanding his views as to the nature of the Party, the author believed that membership in it could not con-

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[52] Of course, if the membership clause were nothing but a conspiracy statute, it would be superfluous since conspiracies to advocate forcible overthrow are punishable either under the general conspiracy statute or under the Smith Act itself. 18 U.S.C. 2385, as amended July 24, 1956.

[53] *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 244, states that the view of the nature and purposes of the Communist Party expressed by Justice Jackson "did not purport to be a factual finding in that case and obviously it cannot be used as a substitute for evidence in this case to show that petitioner participated in any illegal activity or did anything morally reprehensible as a member of that Party."

stitutionally be proscribed. Thus, Justice Jackson upheld section 9(h) of the Taft Hartley Law (at 434) only because it did not prohibit an individual from being "a full fledged member of the Communist Party" or prevent members "from engaging in any above-board political activity normal in party struggles under our political system."[54] Since the membership clause has all of these vices, the opinion in *Douds* plainly foreshadows its invalidity.

It is apparent that the Government has a dual objective in this case. It seeks to sustain the constitutionality of the membership clause by analogizing it to a conspiracy statute. In doing so, it also seeks to avoid the burden of proof which embarrasses it in Smith Act conspiracy cases and to dispense with the necessity for instructions which even the "looseness and pliability" of conspiracy law[55] require for the protection of the accused (*supra*, p. 40). The Constitution makes these objectives irreconcilable. The Government's effort to reconcile them simply confirms our demonstration that the membership clause cannot be validated on conspiracy principles and is unconstitutional because it imputes guilt solely from association.

C. THE STATUTE, AS WRITTEN, IS UNCONSTITUTIONAL FOR ADDITIONAL REASONS.

1. *The lack of intent.*

As the Government concedes (G. Br. Rearg., p. 7), the statute as written authorizes the conviction of an accused who joins a group, knowing that it advocates foreible overthrow, not in order to further the forbidden objective but to help to realize legitimate reforms. The Court has flatly

[54] The prevailing opinion (at 403-04) expresses the same view.

[55] *Krulewitch* v. *United States*, *supra*, at 449 (concurring opinion).

held that such a statute is unconstitutional. *Herndon* v. *Lowry, supra* at 259, summarizes the decision in *Stromberg* v. *California, supra,* as follows:

> " . . . where a statute is so vague and uncertain as to make criminal an utterance or an act which may be innocently said or done with no intent to induce resort to violence or on the other hand may be said or done with a purpose violently to subvert government, a conviction under such a law cannot be sustained."

The effect of the omission of intent from the statute is to make evidence of membership in an organization with knowledge that it advocates illegal doctrine conclusive evidence of criminality. But *Adler* v. *Board of Education, supra,* holds that such membership and knowledge cannot constitutionally give rise to a conclusive presumption even of unfitness to hold public employment. The Court there sustained the New York Education Law only because it made membership in an organization with knowledge of the organization's seditious purpose merely prima facie evidence of unfitness to teach which could be rebutted by the teacher at a hearing accorded by the statute. The Court stated (at 496, emphasis supplied):

> "Where, as here, the relation between the fact found and the presumption is clear and direct *and is not conclusive,* the requirements of due process are satisfied."

The Government asserts (G. Br. Rearg., pp. 9-10), that the majority in *Whitney* v. *California, supra,* affirmed the conviction without consideration of the defendant's intent. This is careless reading. The Court stated (at 366) that Whitney attacked the conviction because there was "no showing of a specific intent on her part to join in the forbidden purpose of the organization." It then held (at 367) that this contention was foreclosed by the verdict and the

decision of the state court on what was merely a disputed question of fact, "which is not open to review in this Court."

The Government's reliance on *Bryant* v. *Zimmerman*, 278 U.S. 63, is misplaced. No question concerning the lack of a statutory requirement of intent was raised or considered. Moreover, since the offense was merely a misdemeanor in aid of a regulatory measure, it was an offense of the kind which requires no criminal intent. *Morissette* v. *United States*, 342 U.S. 246, 258-59, and cases there cited.

2. The lack of an "activity" factor.

The Government makes no serious attempt to defend the application of the statute to a passive member or one whose activity is confined to attendance at meetings. It all but concedes (G. Br. Rearg., pp. 24-25) that so applied, the statute would be contrary to *De Jonge, supra,* and violate the First Amendment and due process. Nor does the Government press the proposition that the statute can be saved by confining it application to "active" members whose activity is peaceable and constitutionally protected. It urges (*id.*, 27) that the statute can be constitutionally applied to "a dedicated, full-time, proselytizing communist." Apparently this is the kind of a Communist whose membership, as earlier described by the Government (1958 Br., p. 49), "entails rigidly disciplined adherence to and labors for the organization's unlawful objective."

What is implicit in these and similar descriptive phrases (e.g. 1958 Br., p. 53) is that the membership clause is constitutional if its application is restricted to members whose conduct would authorize convictions for conspiracy to violate the "advocacy" provision of the Smith Act. But the Government does not write this restriction into its definition of an "active" member. Nor can it do so without mak-

ing the membership clause a carbon copy of the offense of conspiring to advocate forcible overthrow, a result which Congress obviously could not have intended.

D. THE INTERPRETATIONS OF THE STATUTE PROPOSED BY THE GOVERNMENT ARE IMPERMISSIBLE.

1. Specific intent.

We assume for the purposes of the present discussion that, contrary to what we have shown above, the membership clause would be constitutional if interpreted to require proof that the accused had the specific intent of accomplishing forcible overthrow as speedily as circumstances would permit.

The argument for this interpretation of the statute is based on a misapplication of the *Dennis* decision. *Dennis* held that a specific intent to overthrow the Government by violence was an unexpressed but necessarily implied element of the offenses defined in the "advocacy" and "organizing" provisions of the Smith Act and of conspiracy to commit these offenses. The Court did not reach this conclusion on the ground that it was required by constitutional considerations. What the Court held (at 499) was that, "The structure and purpose of the statute demand the inclusion of intent as an element of the crime. . . . Certainly those who recruit and combine for the purpose of advocating overthrow intend to bring about overthrow." Judge Hand put the same thought as follows (183 F. 2d 201, 214-15):

> "Obviously one cannot teach or advocate the use of violence without specifically intending to bring about its use; *a fortiori* must that be true if one organizes a group so to teach . . . the sections carry their own specific intent."

Thus the result in *Dennis* was merely an application of the principle that an accused is presumed to intend the probable consequences of his own acts.

This nexus between act and intent is lacking in the case of the offense defined by the membership clause. It cannot rationally be said that because a person becomes or remains a member of an organization knowing it to advocate forcible overthrow, he must intend to effectuate the purpose. As the Government acknowledges (G. Br. Rearg., p. 7), membership may be accompanied by an entirely different purpose, e.g., to effectuate other and concededly legitimate policies of the organization, or to reform it. It is for this reason that the Court has refused to impute seditious intent to a member of an organization merely by virtue of his membership and knowledge that the organization has a seditious purpose. *Schneiderman* v. *United States; Knauer* v. *United States; Baumgartner* v. *United States,* all *supra.*

Thus, the reasoning which impelled the Court to read intent into the "advocacy" and "organizing" provisions of the statute is inapplicable to the membership clause. Moreover, the text of the statute as a whole indicates that Congress was cognizant of the distinction between acts which carry their own specific intent and those which do not. For while intent is omitted from the "advocacy" and "organizing" provisions it is included in the "literature" provision, in recognition of the fact that seditious intent cannot be inferred simply from the publication or distribution of literature that advocates forcible overthrow. Again, the "literature" provision omits knowledge of the content of the literature as an element of the offense, thus recognizing that proof of intent carries with it an inference of such knowledge. The fact that the membership clause, in contrast, focuses on knowledge (from which intent cannot be inferred) to the exclusion of intent indicates that the omis-

sion of the latter was deliberate. This conclusion is fortified by the legislative history, cited by the petitioner in *Scales* in his supplemental brief on reargument (this Term), pp. 12-14.

The Government urges that its interpretation of the membership clause is justified under the principle favoring a tenable interpretation of a statute which avoids serious constitutional issues (G. Br. Rearg., pp. 15-16). As we have seen, the *Dennis* case gives no support to this contention. *Screws* v. *United States*, 325 U.S. 91, and *A. C. A.* v. *Douds*, 339 U.S. 382, on which the Government also relies are similarly unhelpful to it.

Unlike the proposal of the Government here, the interpretation given the statute in *Screws* (at 101-03) did not involve the interpolation of additional words into the law but was based on a construction of the word "willful" which was thought not to be an innovation and which found support in the legislative history. Even so, only four members of the Court concurred in this interpretation, while three members dissented, stating (at 151), "Such transforming interpolation is not interpretation."

Douds likewise turned on the construction of language which appeared in the statute, in that case the words "believe in . . . the overthrow of the United States Government by force." The prevailing opinion (at 407) construed this phrase narrowly to mean belief in forcible overthrow "as an objective, not merely a prophecy." However, this opinion spoke for only three of the six members of the Court who participated in the case.[56] The other three participants held the belief portion of the statute unconstitutional, two (at 421-22, 444 ftn. 14) specifically rejecting the interpreta-

[56] In the subsequent case of *Osman* v. *Douds*, 339 U.S. 846 the Court divided four to four on the belief portion of the statute.

tion given it in the prevailing opinion as impermissible, and the third dissenting on broader grounds.

As we have seen, the Government's interpretation of the membership clause cannot be inferred from the text and is contrary to the legislative intent which appears from the Smith Act as a whole as well as from the legislative history. Thus, the proposed interpolation goes much further in amending the statute than the interpretations which only a minority of the Court found acceptable in *Screws* and *Douds*. Accordingly, these cases, far from aiding the Government, are authority for rejecting its position.

2. "Activity".

Since the indictment did not charge that petitioner was an "active" member, it must be dismissed if the statute as properly interpreted makes "activity" an element of the offense.[57] *United States* v. *Carll*, 105 U.S. 611, cited with approval, *Morissette* v. *United States*, *supra*, at 270; *Pettibone* v. *United States*, 148 U.S. 197. Moreover, even if the Government could leap this hurdle, a reversal would be required since the issue of petitioner's "activity" was not submitted to the jury.[58]

In any event, and even if the "activity" factor contributed in some way to the constitutionality of the membership clause, there is no basis for writing the Government's standard of "activity" into the statute. The Government has chosen to define an "active" member (G. Br. Rearg., p. 24) as one who devotes all or a substantial part of his time and

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[57] Petitioner moved to dismiss the indictment on the ground, among others, that it did not state facts sufficient to constitute an offense (R. 2).

[58] It can hardly be contended that petitioner waived this error since the Government itself did not discover the existence of the "activity" factor until a year and a half after the trial of this case.

efforts to the organization. By that standard, a Jimmie Higgins who spends all of his time stuffing envelopes with organizational appeals for support of the Court's decisions on racial integration is an "active" member. But a member whose only work for the organization consisted in spending a day distributing a call for an immediate armed march on Washington is not "active" and therefore not punishable under the membership clause.

A statute which imposes punishment because of the quantity of an accused's "activity" without regard to its quality may make sense to the Government. Perhaps there are arguments which may be advanced in support of this standard. But the question is not whether the standard is reasonable. The question is whether Congress intended to incorporate the Government's standard of "activity" into the membership clause rather than some other standard or no standard at all. There can, of course, be no answer to this question other than that, as far as appears, Congress never gave the matter a thought. Under these circumstances, to write the Government's definition of "activity" into the statute is not to interpret but to legislate.

There is even less justification for the Government's alternative proposal (G. Br. Rearg., pp. 22-23) that the "activity" factor should be applied by the courts as a constitutional limitation on the application of the statute.[39] If this proposal were sound, legislation could never be invalidated for inherent unconstitutionality. For the courts would be obliged to rescue an invalid statute by supplying the requisite constitutional limitations without regard to the text of the law or other indicia of legislative intent. Furthermore, this proposal would deprive an accused of

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[39] Assuming, contrary to what we have shown, that the membership clause is constitutional as applied to "active" members.

a jury trial on those ingredients of the offense which are supplied by judicial construction. The argument that this is permissible in the case of the "activity" factor (G. Br. Rearg., pp. 26-27) rests on a false analogy to the clear and present danger doctrine.

The proposition that the clear and present danger doctrine is to be applied by the court rather than the jury rests solely on the prevailing opinion in *Dennis* which had the adherence of only four members of the Court. The holding of that opinion (at 515) turned on the statement that the issue under the clear and present danger doctrine bears "the marks of a 'question of law' ". That is doubtless true of the doctrine as reformulated in *Dennis*. For it requires (at 510) discounting the gravity of the "evil" by its improbability and then determining whether the magnitude of the resultant danger justifies the invasion of First Amendment rights. The application of this formula involves value judgments and considerations of policy which seem quite foreign to the judicial function and which certainly have never been conceived to be within the province of a jury.

The application of the "activity" factor, on the contrary, requires nothing but a simple factual determination: How much time did the accused devote to the organization? This fact question is plainly one for the jury and, under the Sixth Amendment, may not be decided by the court.

Finally, the evidence in this case fails to establish that petitioner "devoted all, or a substantial part, of his time and efforts to the Party" (G. Br. Rearg., p. 24) during the period within the statute of limitations (see *supra*, p. 73). Hence, he was not proved to have been an "active" member, and application of the Government's proposed constitutional limitation would, in any event, require his acquittal.

CONCLUSION

The judgment below should be reversed with directions to dismiss the indictment or enter a judgment of acquittal.

Respectfully submitted,

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APPENDIX A

Statutes Involved

1. Section 2 of the Smith Act, 18 U.S.C. 2385, as in force on the date of the indictment provided as follows:

Whoever knowingly or wilfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or

Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or

Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

2. The Internal Security Act of 1950, 50 U.S.C. 781 ff., as amended, provides in part as follows:

Sec. 2. As a result of evidence adduced before various committees of the Senate and House of Representatives, the Congress hereby finds that—

(1) There exists a world Communist movement which, in its origins, its development, and its present practice, is

a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization.

• • •

(4) The direction and control of the world Communist movement is vested in and exercised by the Communist dictatorship of a foreign country.

(5) The Communist dictatorship of such foreign country, in exercising such direction and control and in furthering the purposes of the world Communist movement, establishes or causes the establishment of, and utilizes, in various countries, action organizations which are not free and independent organizations, but are sections of a world-wide Communist organization and are controlled, directed, and subject to the discipline of the Communist dictatorship of such foreign country.

(6) The Communist action organizations so established and utilized in various countries, acting under such control, direction, and discipline, endeavor to carry out the objective of the world Communist movement by bringing about the overthrow of existing governments by any available means, including force if necessary, and setting up Communist totalitarian dictatorships which will be subservient to the most powerful existing Communist totalitarian dictatorship.

• • •

Sec. 3. For the purposes of this title—

• • •

(3) The term "Communist-action organization" means—

(a) any organization in the United States (other than a diplomatic representative or mission of a foreign government accredited as such by the Department of State) which (i) is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement referred to in section 2 of this

title, and (ii) operates primarily to advance the objectives of such world Communist movement as referred to in section 2 of this title; and

(b) any section, branch, fraction, or cell of any organization defined in subparagraph (a) of this paragraph which has not complied with the registration requirements of this title.

(4) The term "Communist-front organization" means any organization in the United States (other than a Communist-action organization as defined in paragraph (3) of this section) which (A) is substantially directed, dominated, or controlled by a Communist-action organization, and (B) is primarily operated for the purpose of giving aid and support to a Communist-action organization, a Communist foreign government, or the world Communist movement referred to in section 2 of this title.

* * *

(5) The term "Communist organization" means any Communist-action organization, Communist-front organization, or Communist-infiltrated organization.

* * *

(15) The terms "totalitarian dictatorship" and "totalitarianism" mean and refer to systems of government not representative in fact, characterized by (A) the existence of a single political party, organized on a dictatorial basis, with so close an identity between such party and its policies and the governmental policies of the country in which it exists, that the party and the government constitute an indistinguishable unit, and (B) the forcible suppression of opposition to such party.

* * *

Sec. 4. (a) It shall be unlawful for any person knowingly to combine, conspire, or agree with any other person to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship, as defined in paragraph (15) of section 3 of this title, the direction and control of which is to be vested in, or exercised by or under the domination or control of,

any foreign government, foreign organization, or foreign individual: *Provided, however*, That this subsection shall not apply to the proposal of a constitutional amendment.

* * *

(c) It shall be unlawful for any agent or representative of any foreign government, or any officer or member of any Communist organization as defined in paragraph (5) of section 3 of this title, knowingly to obtain or receive, or attempt to obtain or receive, directly or indirectly, from any officer or employee of the United States or of any department or agency thereof or of any corporation the stock of which is owned in whole or in major part by the United States or any department or agency thereof, any information of a kind which shall have been classified by the President (or by the head of any such department, agency, or corporation with the approval of the President) as affecting the security of the United States, unless special authorization for such communication shall first have been obtained from the head of the department, agency, or corporation having custody of or control over such information.

(d) Any person who violates any provision of this section shall, upon conviction thereof, be punished by a fine of not more than $10,000, or imprisonment for not more than ten years, or by both such fine and such imprisonment, and shall, moreover, be thereafter ineligible to hold any office or place of honor, profit, or trust created by the Constitution or laws of the United States.

* * *

(f) Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute. The fact of the registration of any person under section 7 or section 8 of this title as an officer or member of any Communist organization shall not be received in evidence against such person in any prosecution for any alleged violation of subsection (a) or subsection (c) of this section or of any alleged violation of any other criminal statute.

* * *

Sec. 7. (a) Each Communist-action organization (including any organization required, by a final order of the Board, to register as a Communist-action organization) shall, within the time specified in subsection (c) of this section, register with the Attorney General, on a form prescribed by him by regulations, as a Communist-action organization.

(b) Each Communist-front organization (including any organization required, by a final order of the Board, to register as a Communist-front organization) shall, within the time specified in subsection (c) of this section, register with the Attorney General, on a form prescribed by him by regulations, as a Communist-front organization.

* * *

(h) In the case of failure on the part of any organization to register or to file any registration statement or annual report as required by this section, it shall be the duty of the executive officer (or individual performing the ordinary and usual duties of an executive officer) and of the secretary (or individual performing the ordinary and usual duties of a secretary) of such organization, and of such officer or officers of such organization as the Attorney General shall by regulations prescribe, to register for such organization, to file such registration statement, or to file such annual report, as the case may be.

Sec. 8. (a) Any individual who is or becomes a member of any organization concerning which (1) there is in effect a final order of the Board requiring such organization to register under section 7(a) of this title as a Communist-action organization, (2) more than thirty days have elapsed since such order has become final, and (3) such organization is not registered under section 7 of this title as a Communist-action organization, shall within sixty days after said order has become final, or within thirty days after becoming a member of such organization, whichever is later, register with the Attorney General as a member of such organization.

(b) Each individual who is or becomes a member of any organization which he knows to be registered as a Communist-action organization under section 7 (a) of this title,

but to have failed to include his name upon the list of members thereof filed with the Attorney General, pursuant to the provisions of subsections (d) and (e) of section 7 of this title, shall, within sixty days after he shall have obtained such knowledge, register with the Attorney General as a member of such organization.

* * * * *

SEC. 15. (a) If there is in effect with respect to any organization or individual a final order of the Board requiring registration under section 7 or section 8 of this title—

* * * *

(2) each individual having a duty under subsection (h) of section 7 to register or to file any registration statement or annual report on behalf of such organization, and each individual having a duty to register under section 8, shall, upon conviction of failure to so register or to file any such registration statement or annual report, be punished for each such offense by a fine of not more than $10,000, or imprisonment for not more than five years, or by both such fine and imprisonment.

For the purposes of this subsection, each day of failure to register, whether on the part of the organization or any individual, shall constitute a separate offense.

APPENDIX B

Excerpts From the Congressional Debate on the Communist Control Act

House Majority Leader Halleck (100 Cong. Rec. 14850):

"I have as quickly as I could and as well as I could examined the language of this amendment. As I read it, it does undertake to make membership in the Communist Party a felony per se * * *. Again may I point out, as I and others pointed out yesterday, that if you make membership in the Communist Party per se a felony, then to require them to register, which is the requirement of the Internal Security Act, would require them to provide evidence incriminating themselves, and thus necessarily would excuse them from compliance with the act. The appeal that is pending now in the circuit court of appeals to determine the validity of the Internal Security Act of 1950 would be immediately written off. They will be in there with a petition to remand the case and it will be remanded. Do not scoff at that. That is the exact fact. That is the position taken by the Attorney General, by the Director of the F.B.I., J. Edgar Hoover, and by the lawyers who have studied the matters."

Representative Reed, Chairman, House Judiciary Committee (id., p. 14643):

"Section 3 of the bill, as it passed the Senate, merely provided that one who remained, or became a member of the Communist Party or organization advocating the overthrow of the Government, by force or violence, with knowledge of that purpose, and who committed an overt act in furtherance of those objectives was subject to a criminal penalty.

"That provision, as it passed the Senate, destroyed the very effective Subversive Activities Control Act of 1950, which specifically provided that membership in the Communist organization was not per se a violation

of any criminal statute. Such provision was written into the law in order that the registration and filing requirements operate effectively to control those Communist groups. Otherwise, they could have pleaded their privilege against self-incrimination and thereby avoid the requirements of the statute. The Senate version would have destroyed the very effective requirements of the Internal Security Act and would thus have defeated the very purpose for which it was written."

Senator Ferguson, a co-author of the Internal Security Act (id., p. 14723):

"Here we are creating a new crime, the crime of knowingly and willfully becoming or remaining a member of the Communist Party or an organization which is described in the bill. The section continues and defines what a member is.

I submit to the Senate this plain question: Does the Senate desire at this time to repeal the Internal Security Law which was passed in 1950, which was vetoed by the President of the United States, and which was passed over the veto of the President of the United States in the House of Representatives and in the Senate? Do we desire today, by this vote, to repeal the real keystone of the arch in that legislation? If we do, then we should vote for this amendment.

If we vote for this amendment, we cannot have registration of Communists, because to require a man to testify against himself by registration would be violating the Constitution of the United States. There is no law of the land which would require a man to violate that provision of the Constitution and register, if there was a law making it a felony, as is sought to do by this amendment, to be a member or knowingly to remain a member of the Communist organization."

Senator Butler, author of S. 3706 (id., p. 14578):

"My judgment would be very seriously swayed by an opinion of an astute attorney general which Mr. Brownell is. I think we must give weight to his opinion. I think especially is that the case when the Attorney General has also told us that to adopt the language of the Senate bill would very seriously affect or hamper the existing case brought under the Internal Security Act now in the circuit court of appeals."

APPENDIX C

Excerpt From Order of the Court Setting Scales v. United States for Reargument

"(1) Is the Membership Clause of the Smith Act, 18 U.S.C. Sec. 2385, valid under the Constitution of the United States if it be interpreted to permit a conviction based only on proof that the accused was a member of a society, group or assembly of persons described in the Act knowing the purposes thereof?

"(2) If not, is the Membership Clause constitutionally valid if interpreted as also requiring proof that the membership was accompanied by a specific intent of the accused to accomplish those purposes as speedily as circumstances would permit? Does the Smith Act permissibly bear such an interpretation?

"(3) If the Membership Clause would not be constitutionally valid as interpreted under (1) or (2), would the clause be constitutionally valid if interpreted as requiring as an element of the crime proof that the accused was an 'active' member? Does the Smith Act permissibly bear such an interpretation? If not, and if the clause be valid without such element, does a constitutional application of the Membership Clause depend upon any such requirement, and if so was such a requirement properly applied by the courts in this case?

"(4) Whether the 'clear and present danger' doctrine, as interpreted by counsel, has application to the Membership Clause, either with respect to the accused or with respect to the 'society, group, or assembly of persons' described in the statute. If applicable, whether such doctrine was or can now be, properly applied in this case.

"(5) Is Sec. 4(f) of the Internal Security Act, 50 USCA 780, a bar to the present prosecution? Counsel are requested to discuss the relevance of the registration provisions of that Act to this question."